

GIFT OF
Edward G. Fletcher

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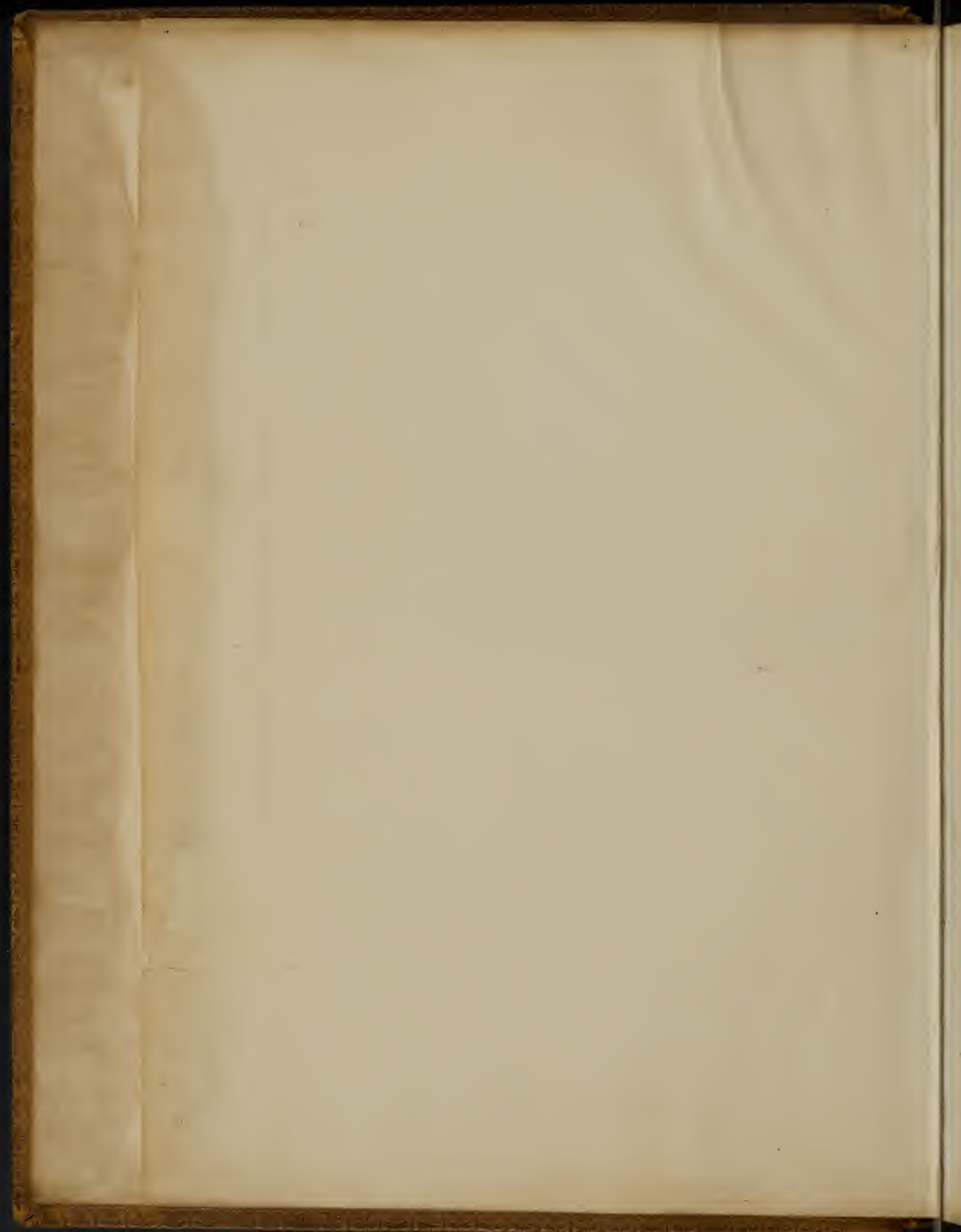
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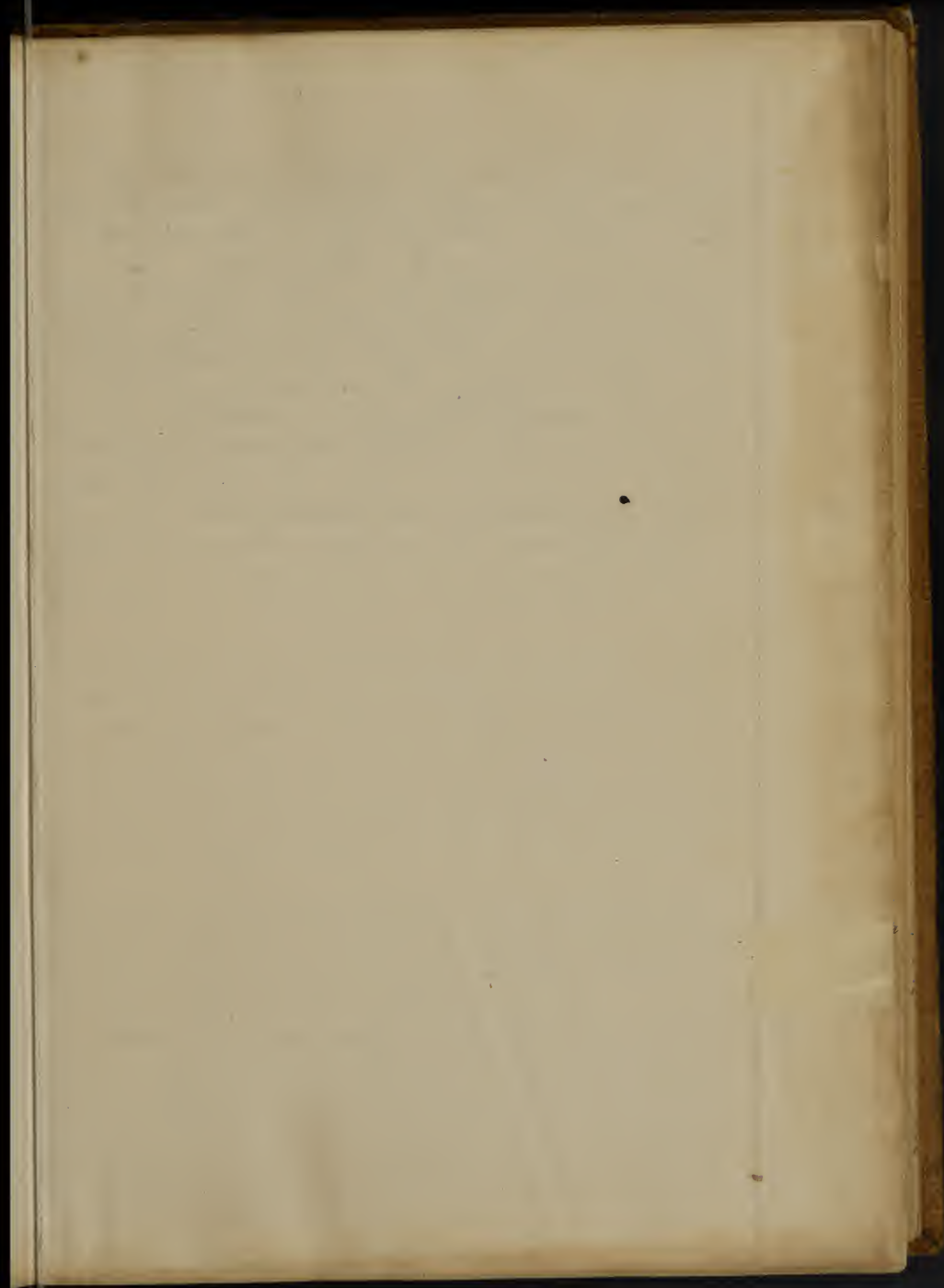
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Presumptive Evidence 25. Kinds of
Evidence 30. General Rule Indgmt on
Verdict binds only the Parties and Privies,
35. Public Writings not Record. 51.
Private Writings 63. Explanation of
Written Instruments 74. Parol Evidence
79 Who are competent witnesses and
who not 87. Want of Understanding
79. Legal Infamy 82 Interest 88-98
Witness competent, whose interest is
Balanced 106. Of liable to a greater
extent in one event, than the other, Incompetent
108- Examination of Witnesses, 121.
The attendance of witnesses now compelled
123.

Evidence.

The credibility and weight of Evi are generally to be determined by a Jury. Its admissibility being a matter of law, must be settled by y Ct. Long 360. 2 H Bl. 265. Peakes Evi 2.3

When however a record is put ~~directly~~ ⁱⁿ issue, by y Plea "nul Tild record", y weight and effect are to be determined ~~by y Judge~~ ^{by y Judge} - for a record is of too high a character to be tried by a Jury, or in any other way ym by itself. 3 Bl 330. 31. 6. Co 53. Co Litt 117. 260. Pea Evi 2.3. ~~It is to be tried by y Ct.~~ ^{try it} by inspection Lane Lawes. 1462. 226.

But when a record is introduced incidentally on an issue, to a Jury, it is to be read as Evi to them, tho in its effects it may be conclusive of y facts it imports to find or establish ~~it~~ ^{it} a judgment and execution as Evi of a Title in ejectmt. Auth ibid.

Neither
An y party is bound to prove those facts wh are not denied for such part of y Pleadings on one side as are not denied by y other, are of course admitted to be true. Bull. NR 298
4 Bacon 2, ³ Pias Pea 4.5.

And an admission on y record by y one party of any allegations on y other side, precludes y former from denying on y trial y facts so admitted. Ibid.

The burden of proof lies regularly on y party who takes y affirmative of y issue, for in gen a negative don't in y nature of y thing admit of direct proof. ^{burden of proof lies with y Aff} Bull. NR 297. 98. Pea Evi 5.1.
Phil. 150. 1. H 144. 649. 4 H 33. 38.

But there is an exception to ys Rule when one is prosecuted for not doing what he is bound to do, for in such case, to presume y negative, wd be to presume guilt, and ys exception holds as well in civil as in criminal cases, as indictment for not repairing a bridge or highway. Gill Evi 148. Pea Evi 5.6. Gomb 55
Bull. NR 298. 1. Phil 151. 3 East 192. 10. East 216. 2 Camp 654. 2 H. R.

And y^e exception holds in all cases, where y^e alleged omission involves a crime or offence. Does it hold however unless y^e alleged omission amounts to a criminal neglect? It don't from y^e tenor of authority.

And if issue is taken on y^e life or death of a person once existing, y^e burthen of proof lies on y^e party asserting his death, for y^e legal presumption is, yt y^e person once living continues so, till by direct or presumptive evi, it appears to y^e contrary. and y^e rule wd be y^e same, I trust tho' yt party shd plead yt fact in y^e negative: as by alleging yt J. P. was not living.

Pea Evi 313. Camp 113. 2 East 312. 1 Phil 152.

Secus after an absence of 7 yrs, unheard of. It James 1. Ch. 11 in wh case he is presumed dead and y^e presumption may be rebutted by Evi. 6 East 55. S.D. 1 Phil 152. 2 Camp. 113.

So, in Conn under y^e St of divorce - So legal marriage being proved, legitimacy of issue born during wedlock is presumed.

See Parent and Child -

Irrelevant Evi. II. No other evi can be recd, than such as is pertinent to y^e issue or matter of fact in dispute. - Other evi yn y^e is called irrelevant. 2 H Bl. 205. Pea Evi 6.

Hence y^e character of either party in a civil case can't be called in question, ni it is put in issue by y^e proceeding itself, 18. unless it conduces to prove or disprove some matter of fact involved in y^e issue. 1. Phil 139. Pea Evi 6. Bull N B 296 298.

Thus in an action for fraud. y^e Plt^r is not at liberty to prove yt y^e Def is reputed a knave, nor in an action of Slander, yt he bears y^e character of a defamer, for if he were, it don't follow, yt he has done y^e act charged. Nor is y^e Def in such a case allowed to support his character by proving y^e contrary: for y^e Evi is not considered as conducing in any degree, yt y^e law can regard to prove or disprove y^e matter in issue. 1. E. an action for fraud, or slander. Pea 240. 1 Phil 139. 2 Phil 152. Pea Evi 6.

In cases where a party is allowed by St Law to testify in his own cause and does testify, his character for truth and

voracity may be impeached not as a party, but as a witness, 3
as in action for Book debt in Court

But in an action for criminal conversation, y Def may
in mitigation of damages, not only impeach y general character
of Plt's wife, but may prove particular facts of her incontinency
with others. for Plt by charging Def with seducing her, puts in issue
her character for previous chastity, and general behaviour in issue.
B & R 296. 2 Esp R 562. 1. Felw. 30. 31. 4 TR 657. Gill Eri 113.
1. Phil 139. Pea Eri 7. "Hud & Wyke"

But def is not allowed to prove instances of her misconduct
subsequent to her alleged adultery with himself, for such misconduct
may have been occasioned by his own wrong. Pea Eri 7. 2 Esp R 562.
1 Felw. 31. 1 Phil 139.

In an action for a breach of promise for marriage, Breach of
Promise.
also, y def is allowed in mitigation of damages to impeach y
general character of Plt for chastity and to prove instances of her
licentious conduct: for y action puts her character and conduct in
issue as in adultery. 3 Esp R. 136. 1. Felw 31. note. 3 Mass R. 189. 1 Johns
cases 116. Note may he not impeach her moral character in any and
every way, or respect? Welsh vs Polhins. from y peculiar nature of y
action, I think he may.

But it has been holden, when y Plt has seduced y Plt,
yt evi vs her gen character can't be admitted in ys action, in
reference to y time between making y promise and y breach, of it.
as y seduction itself may have occasioned y loss of character.
This seems to be a correct distinction. I dare not actual
prostitution by y Plt after y making of y promise, be a bar to y
actual action? 3 Mass R 189.

So also in an action by a parent or master for seducing his Seduction
female servant, laid with a "per quod, y Def may in mitigation
of damages. impeach y gen character of y daughter or servant
and her chastity- and prove her character to have been licentious.
1. Root 472. For loss of service is principally y gist of action
It is not where y parent sues- for then y principal ground of

damages is y violence done y affections of y Pltff, and disgrace occasioned to his family. 3 Wils 19. Esp D. 645. 11 East 23. 25. 2 Selw. 1087. 1 Root 472. Note can he show her character was bad after seduction. I think not.

But a previous promise of marriage can't be proved in y action in aggravation of damages, since yt entitles y daughter to an action in her own name, 1 John 297.

Slander.

In an action of slander, tis y constant practice in Comt, to permit y Def by way of mitigating damages to impeach y gen character of y Pltff as to y species of crime or other matter charged by y words laid, i.e. to prove his general character bad in y respect. 1 Root 472. 3 Mass 318. 1 Johns 40.

In Eng there is no such general rule, but of late, y Comt rule is adopted in Eng. 1 Mal et Selw 284. 2 Camp 257. Pea Evi 140 appx 92.

In slander Pltff may give evi of his rank and condition in life to aggravate damages, and Def may do y same to mitigate ym. 3 Mass R 551.

Malicious Prosecution. In an action for malicious prosecution, def may show Pltffs gen character to be bad by way of showing probable cause, 2 Esp R 726. 1 Phil 139.

Criminal Cases. In criminal cases also where y Defs character is put in issue by y prosecution, y prosecutor may attack his character by proof of particular facts, scow it wd be impossible to prove y charge. Bull N. P. 296. 1 Mc Kally 324. Pea Evi 7.

But a criminal prosecution puts defs character in issue, only where it charges a course or habit of criminal conduct, as contradistinguished from individual specific acts i.e. as an indictment for keeping a bad house - for being a common scold - or common Barrator. Dure can he in such cases enter into defs general character, ni def has first produced Evi in support of it? I shd think not.

But there is a case of y^s sort, where y^e prosecutor is allowed to examine as to particular facts witht giving previous notice of ym. ^{not} ~~2nd~~ ^{1st} where one is indicted for being a common Barator. Pea E 7 Bull N^o 296. 1. Mc Nally 324.

This rule is founded on y^e presumed difficulty of defending^r particular charges witht such notice, y^e prosecution being wth those whose profession it is to carry on suits wth Pettifoggers. Bull 296. Mc Nally 324.

But in criminal cases in wh character is not put in issue, as in prosecution for theft, perjury, or any other specific act, the Prosecutor can't examine into y^e character of def, ni y^e latter has given Evi in support of it, for y^e Evi wd be irrelevant, since a particular fact, and not y^e general character of y^e Def is put in issue by y^e Prosecutor. Bull N^o 296. 1. Mc Nally 324 Pea Evi 7. 8.

And even if y^e Def has thus opened y^e enquiry, y^e Prosecutor can't examine as to particular facts not alleged in y^e Complaint - but as to gen character only, for y^e Def can't be supposed to be prepared to disprove particular charges not put in issue and witht notice -

And where his character is not put in issue by y^e prosecution, there is and can be no legal notice of ym. E g. action for Theft or forgery. Bull N^o 296. 1. Mc Nally 324. Pea Evi 7th.

But in criminal prosecutions in wh y^e ~~Plt~~ ^{Plt} true character is not put in issue, he is indulged in proving y^t his general character is good - as p prosecution for perjury, Theft - 1. Mc Nally 320, 22. 1. Phil 140. Pea Evi 8.

This rule is founded on y^e benignity of y^e Law towards persons arrested for crimes, for in strickeness it is no more relevant yn contrary Evi (in y^e first instance) on y^e other side.

The indulgence was olim allowedⁱⁿ in capital cases but it is now extended to misdemeanors - where y^e direct object of y^e a ^{sum of money} prosecution is to punish y^e offence, and not barely to collect y^e or a penalty.

2 Bet P. 532 note 1. McHally 325-22- 1. Phil 139. 40.

Pea 8 on Evi - It is not allowed in actions or informations for mere penalties, these being regarded as not purely criminal proceedings, or as direct prosecutions for crimes. Pea 8, But supposing y offence inducing y penalty is 'malum in se' wd not y Evi be admissible?

Peaks says, yt y rule extends to no other yn prosecutions for offences incurring corporal punishment.

Note ys wd exclude offences wh at CL include a fine - Pea 8. Ped quere for his authority don't seem to support so gen a proposition. 2 Bet P. 532. n. and there are opinions directly opposed to it. 1. McHally 320. n

Besides there appears to be no satis reason for such restriction - Phil 140.

Rape

On an indictment for rape y prisoner may give in Evi yt y woman's character is notoriously bad in point of chastity, E3 yt she had previous criminal intercourse with himself, but not yt she had intercourse with another. The Evi is supposed to diminish y probability of his violence in y two former cases, in y last it is not. 1. Phil 140.

Evi in support of defs' general character in a criminal prosecution, may be particular as well as general, 1E. y witness may not only testify in favour of defs gen character but may assign particular reasons for his opinions. 1. McHally 320. 24. B. & R. 296. This is a dangerous sort of Evi tending to make an undue impressin on y Jurors minds. ante 71.

But evi against his character must be general, only for y reason before given (6. Dze) for he is supposed unprepared to defend himself vs particular facts. Bull N.R. 296. 96.

In such cases in wh y evi of guilt is weak or merely presumptive, proof in support of defs character is very important and has a great effect. Pea 8.

Phil 140. But in opposition to direct and credible testimony, it is of little avail and ought to have little effect. 2 Mass R 317. Phil

III. In all cases y best evi is to be produced, if y nature
of y case admits of, withholding y^s and giving evi of an inferior
sort or secondary evi, affords reason ^{to presume} y^t y former wd make
vs y party offering y latter - Pea Evi 8. 9. 102. 1. McNally
342. This rule relates to y species or kind of Evi and not
to y strength of y Evi - Thus if a party wishes to prove y
contents of a written Instruments in existence and in his custody,
y instrument itself must be produced. The contents can't be proved
by parol Evi, nor by Copy - 1 E. in debt on bond, y bond itself
must be produced, Pea 9. 10. Co 92. 1. McNally 356, 60. 2 to 468.
Note as to instruments lost or in possession of y adverse party,
vide Post 39. 69-79. ante proffert -

So also if a deed is attested by a subscribing witness, y execution Attesting deed
can regularly be proved by no other evi. yⁿ his or rather
it can't be proved with y testimony of such witness, tho'
it may vs his denial. Long 205. or 216. 1. Ep R 89. 4 East
53. 2 East 173. Ep D. 257 &. Pea Evi 9. Exceptions to this
rule vide post. 80. 82 - where they will be produced -

But y Law don't require all y Evi to be produced, thal can
be produced. Hence y evi of one subscribing witness to a deed
may be satis to prove y execution of it - Post 80. tho' there
were more subscribed - Pea Evi 9.

In general no prescribed number of witnesses is necessary. The number
at C Law - to establish a fact - such Evi as satisfies y Jury
is satis, Of course one credible witness, is all y law requires
to prove any thing - Carth 144 - Co Lit. 6b. 1. McNally 16. 1.
Phil 107. On a prosecution for perjury - however, 2 witnesses Perjury -
are necessary to y conviction of any one - For secus there wd
be one oath vs one oath - The Evi must be equivalent to y
testimony of 2 witnesses -

The rule however don't absolutely require 2 witnesses,
but there must be some independant Evi in addition to y
testimony of y one - 4 Rb 358. 10. Mod 194. 1. McNally 37. 31.
1. Phil 107. 108. 2 Hawk Ch 25. Sec - 129. Pea Evi 9.

And by y^e St Law of Comt, no person can be convicted of any capital crime, but upon y^e testimony of 2 or 3 witnesses, or y^t w^h is equivalent - St Comt 680. Evi see 142-

In y^e construction of y^e St, it's not necessary for 2 witnesses to testify to y^e same fact or facts, one may testify to one fact of y^e transaction, another to another. Or y^e testimony ^{one} may be direct, and y^e other circumstantial. Or both may testify to facts merely circumstantial.

In either of these case, if y^e witnesses are credible and y^e testimony satisfactory, y^e Jury may convict. Evi 142-
There is no such Eng St as y^t of Comt.

The declarations of a Stranger are regularly no Evi ni made in Ct and under oath. By a Stranger, is meant one not a Party to y^e Suit. Hence if even a Judge or Juror is acquainted with any of y^e facts in issue, he is to be sworn and examined in Ct, - He has no right to act upon y^t knowledge ni delivered in Open Ct - Pea Evi W. n 2 Mod 99. 1. P. 146.

III. It follows from y^e principle, y^t hearsay Evi, i. e. testimony of one person of what he has heard another say, is in gen inadmissible - for first y^e witness don't testify to y^e fact in y^e question, but to y^e declaration of another respecting it, & y^t testimony is not in Ct sworn by one sworn in y^e cause, as all testimony is regularly required to be - Secondly there can be no cross examination as to y^e fact in question - Gib Evi 107- Esp D. 784. Bull N. 294- Pea Evi W. 11- 2 East 27. 54- 3 L.R. 72- 1. Phil 173.

exceptions - Where y^e fact is in its nature, or in common presumption incapable of positive and direct proof as a question of Custom - Prescription - Privilege - Pea Evi W. Bull N. 6 283- Esp D. 738- 1. Mac Nally 303.

Thus on a question of Custom, or prescription, Custom w^h can be proved only by Gen. reputation, may be proved by hearsay Evi, for being unimemorial no one can testify to y^e origin

or creation. 18. a witness may state what he heard from dead persons respecting y reputation of y right in question, but not what they have said relative to facts showing y exercise of it, Pea Evi 13. 2 Ves 572. 1. T.R. 466. 5 T.R. 26. 3. 12 East 62. 14 East 327. note 331. note Dag's Edition -

Ancient Limits-

Since on a question respecting ancient limits, a witness may testify what have been y reputed limits, and what dead persons have said respecting ym but not what they have said relative to y former existence of a wall or building in such a place, as y latter wd be Evi of a particular fact, and not of general reputation - Pea Evi 12. 14. 2 T.R. 49. 1 Phil 182. 9. 14 East 92. 1.

Pea App 59.

But y declarations of persons having at y time any interest to make for ym or for others, are inadmissible - This restriction appears to all hearsay Evi in General - 1 Phil 179 180. 3

Evi of Reputation is upon y same principle, admissible in questions respecting right of way - as all declarations of all deceased strangers. Bull N B 295. Pea Evi 12.

Upon a question, an certain piece of land was parcel of an Estate y declarations of a Dead tenant have been allowed as Evidence - This is similar to y question of ancient limits - 2 T.R. 53. 1. Phil 182. 1. La Pay. 734. Pea Evi 12.

Entries made by a dead steward of money recd in satisfaction of trespasses upon a waste - have been allowed to prove a right of Soil and upon y same principle as before laid down - 4 T.R. 667. Pea Evi 12. 13. 5 T.R. 191.

So entries by a dead officer of a township, of moneys recd of another township, have been allowed to prove y liability of y latter township - y entries having been made when disputes existed & by persons who made themselves chargeable for y money - Pea Evi 13.

no
to interest in
y person. see
5 T.R. 131.

So of declarations of a dead parishioner, when no dispute existed as to the boundaries of y parish - Pea 13. app 33

But entries made by one claiming to be y owner of y land, of money pd him by y tenant, is no Evi of his title even as between other parties, he being interested at y time of y Entry to support y title not y entries not go to support.

Still however evi of y declarations of de^{ad} persons, owners of y land restraining y limits claimed by those who derive title from them, is always admitted - 2 TR 55- 1. Esp R 458- 4 John 229- or 299, 10 John 337- 1 Phil 193- 5 QB 123.

On questions of pedigree also, if declarations of de^{ad} persons, who from Pedigree situation were likely to know y facts, may be given in Evi - as facts of y^s kind can frequently be proved in no other way - as declarations of de^{ad} parents upon questions of legitimacy - an a child was born before or after marriage - 1. Dall 14- Esp D- 784- Phil 174-80- 11 East 120- Corp 591- 6 TR 330- 3 TR 719- Bull 112- 294- Pea 110 12. 182-3-

But y declarations of de^{ad} relations are admissible, only where Cow 1594 they are supposed to have been made without any interest, or bias, & each 684. on the side of y party who made ym - 14 East 331 note 1 Phil 176 9

How if made in relation to a suit or controversy, contemplated or depending - Tho there have been some contrarieties of opinion on y^s opinion on y^s point - Cowp 594. 2 Selw. 684. 3 Camp 444. 14 East 331. note -

But declarations of de^{ad} parents are not allowed to prove non access during wedlock - This is forbidden by consideration of morality, modesty, decency & policy - Parents cant thus bastardise children born after wedlock - Cowp 591. 92- Bull NP 112- Esp Dig 485- 1. Phil 180. 8 East 263. Pea 12- 183. 11 East 193.

Declarations of mere strangers as de^{ad} neighbours are not allowed in gen in questions of pedigree as to prove y time, of a birth or marriage - for they are not supposed to have y best means of knowing 3 TR 722 - 1. Mc Nally 312- 1. Phil 176- 14. East 330.

Maid et Selwin 689. Bull N.P. 295.

But y declaration of a de^d surgeon as to y time of a birth wh he attended, is evi it seems, for he is supposed to have y best means of knowing y fact - 1. Phil 181. 10. East 420.

But y general reputation of a family in y place to wh one belongs, is admissible when his pedigree is in question, Tho y declarations of neighbours according to y general rule are not evi an F.S. is son of J. P. Evi 11. *See*

The declarations of a relation is not admissible, if he is living, and can be produced - It is not then y best evi. He sha testify in Ct. 2 Strong 924. Bull N.P. 113. 3 Cam 457. 1. Phil 176.

To prove y state of a family as to marriages, births and deaths, declarations of de^d persons likely to know y fact, and y general belief are good evi, as to prove when a man married, what children he had, an such a member of his family, died abroad what is y age of a child - Bull 294, 95. Esp 3. 738, 80. *See* Evi 12-

In these cases also a recital in a deed, a special verdict stating y pedigree - tho believe other members of y family, Monumental inscriptions - Herald's books Entries in a family bible or other books. or statem^t in a bill of chy. are good evi - These being all in y nature of declarations out of Ct, for they are not under oath -

1 So statem^t in a will made by an ancestor, tho y will was afterward revoked - Bull 294. 5. C.D. 135. 1. Phil 175-6. 11. East 505- 13. Ves. In 144-

But hearsay evi is not allowed to prove y place of one's birth, for yt may be proved by other means 8 East 539. 1. East 373. 2 East 27. 54. 63. 3 F.R. 707.

If then y question an a was born in such place y declarations of y de^d parent cd not be allowed, for it may be proved by y testimony of persons living -

In other cases *yn* those of pedigree, a memorandum made by a person in *y* course of his business or profession, is allowed as *Evi* of *y* fact. Bull. & R. 282. 2. 1129. Talk 245. 380, as *y* memorandum of a drayman as to *y* delivery of beer, *Rea Evi* 13.

This is in *y* nature of hearsay for it is not under oath yet it is distinct from *y* hearsay with regard to pedigree.

A written memorandum made by a party to *y* act, may be allowed in confirmation of *y* testimony of a witness, as a witness testified to *y* delivery of goods and entry by *y* plaintiff. 1. *Exp* 1. 528, *Rea Evi* 13 note.

With regard to an entree made by *y* parties themselves are never of themselves *Evi* in favour of *y* party making them. *Rea Evi* 14 note.

In criminal *y* rule is somewhat more strict *yn* in civil cases, yet here hearsay may be allowed by way of inducement, or by way of illustrating *Evi* wh is proper. 1. *McNally* 14, 282. 97. 99. 301 60, *Rea Evi* 13.

II But there is another important exception to *y* General Rule excluding hearsay *Evi*, in cases of murder, and I conceive in all cases of homicide, This is *y* declaration of *y* person slain under *y* apprehension of approaching death, may be allowed vs *y* prisoner and on *y* principle, *yt* *y* fear of death imposed an obligation to speak *y* truth equal to *y* solemnity, ~~or~~ of an oath. *Rea Evi* 15. 16. 1. *East* O. C. 353. 1. *McNally* 381.

The principle on wh *y* is allowed, is different from *yt* on wh it is allowed in cases of pedigree and when they can't be proved any other way.

But *y* declaration of an attainted person, or felon can't be admitted, for no credit cd be given to his words spoken under oath, since all credit is taken from him. *Rea Evi* 16. 1. *McNally* 387.

But *y* declaration of persons thus murdered must have been under *y* fear or apprehension of death - secus not allowed. 1. *McNally* 383, 385. *Leach* O. C. 364, 397. 563.

The person need not however express his apprehension of death, if
it be determined from circumstances of case. ^{912.} East v. ^N McCall 350.
53. Levens 100 562.

The question as to apprehension of death existed or not, is a preliminary question to be decided by a trier of fact to determine, whether declarations shall be allowed or not. *See* cases 16 & 17.

This is analogous to admitting a copy upon loss of a deed

I send little said on y^e point, but I take these to be y^e Rules
from y^e nature of y^e case. The decision of y^e Ct is not conclusive
on y^e Jury and if y^e Ct say y^e ided not exist, that is, y^e apprehension
yet y^e Jury may say Contra. 1. McNally 358. 6. Leavins Cases
364. 39% 563. and not regard y^e declaration.

To be in civil cases, & declarations of dying persons under apprehension of death, may be allowed - 3 Burn; 124, 55. 6 East 188. 1. M^cally 386.

III. In a subsequent trial, what a witness has testified in a former action, where the same question was in issue - may be given in Evi, if it be between the same parties - for here a witness might have been cross-examined and was so.

1. McNally 283. 5 $\frac{1}{2}$ 3 $\frac{1}{2}$ Foster, C.F. 33% Pea. Eri. 60, 2 Hawk.

This it is said, ^{by Burke} don't hold in criminal cases, and y reason is, y benignity ofy law in favour of criminals, there can be no oth. reason
Plea for Co, But what an absconding witness has testific-

But what an absconding witness has testified on a previous trial, shall not be allowed, if induced to abscond by y party, as Evi on a succeeding trial, but if not induced to abscond by him, and he ^{did} not on due diligence, be found, his testimony may be admitted - Mur. & admitted vs. the party, if he procured the party to abscond. 2. Harkn. 805. 1 Mr. R. 2846.

IV What one of y parties has acknowledged relative to y matter in issue - may always be proved vs him on y trial, This don't come under y former rule respecting hearsay evi, for it is not exactly in y nature of hearsay evi, that being y declarations of strangers 7. T. 663. Pea Ev 16. 1. Phil 71.

These confessions are not however conclusive, for he may on y trial prove y^t y confession y^t he then made, were not true, as if Def has confessed in debtorsness, he may still deny by proof y^t he owed nothing - 1. Doct P. 49. 10 Mass 39. 1. Phil 74. 78. 80.

Nor is a written acknowledgement not under seal conclusive, for y^s is considered in y nature of a verbal declaration - and tho it is presumptive vs him, yet he may contradict it by proof, as in a bill of Lading, as y^t goods shipped, are in good order - here he may prove on trial, y^t they were not - 1. Phil 74 n. 7 Mass 297.

He however who contradicts his own writing, takes y^s onus probandi - The confession must be taken together, i.e. all y^t was said at y time - 1. Phil 79, 80. 1. East 474. 1. Camp. 439. 3 Camb. 215 - He cannot contradict his admissions by other declarations made at another time. 1. 110.

But altho all y accompanying confessions, and qualifying declarations must be proved together, yet y Jury are not bound by y whole, but only so much as they believe -

A Party is never allowed to prove ^{his} declaration, in his own favour, unless they constitute or make a part of y Res Gestae - as Def plead tender, here declaration of Def must be allowed to shew y^t y tender was made, and for what purpose - Sees it wd be impossible to prove y tender, since y mere offer of money witht any declaration, is no tender -

On y same principle an act wh of itself wd constitute an assault, may by y declaration of y party at y time, be explained, so as to constitute no assault - 6. East 188. 1. John B 59. Esp 312. 1 Mod. 3. 1 McNally 373. 75-77. 1. Hawk. 133.

And in a single case, what a party has before sworn in a former action, may be proved in his own favour. - This is a case of action for Malicious prosecution - as A sues B in such an action, B may here give in Evi what he before testified before a Grand Jury, on y prosecution vs y Plt^f - for Sees great injustices might be done to those unfortunate enough to fail in criminal prosecution -

6 Mod 216. Bull N. 14. Esp L. 534, 36.

So too what y Defs wife has testified before. may also be proved in his favour, if she were examined as a witness, and y^s on y principle of necessity to prevent injustice from being done as in y former case - She cd not be witness vs husband

The confessions of a party on record may be proved vs him, an he is sued in his own capacity, or as trustee - or Executor - of another for he is party to y record in either case -
J. S. R. 663. 1 Phil 72. Pea 16 Post 129.

And on y other hand, y declarations of y party having y real interest in y suit, tho' not party on y record - may be given in Evi vs y party on record, as in debt or bond - for paymt of money to be made to B. B's confessions are evi for Def, for if he had been party on record, they wd have been Evi - 11. East 578, 89. 1 Wils 257. 1 Phil 72 - 10 East 395 - 3 Camp 465

And y declarations of strangers made in presence of y party and not controdicted by him, may be proved vs him, for his silence may be construed into an assent to y truth of y declaration - and if he acknowledged y truth of y fact whi were vs him, it wd be a virtual confession of ym - Pea 16.

But y declarations of a stranger in absence of y Party, an in gin no Evi vs y party, for one person cant confess away y rights of another. - This was refused in an action for y wages of y wife, brt by y husband, y confessions of y wife of paymt were not allowed - and it wd seem, yt if there were any case, in wh it wd be, it wd be y^s. 2 Str 1094. 6 TR 680. 1 Wils 577. R. v. L. 16. 17

And even in actions by husband and wife in her right, as Executrix, y confession of y wife after coverture, cant be given in Evi - for during coverture her powers as Executrix are suspended entirely - so yt were she to acknowledge after marriage receipt of paymt. it wd not be Evi, yt had she made such confession before marriage, it wd have been, for her powers were not then suspended, but in operation
?

The acknowledgmt of any individual member of a corporation aggregate
not in y exercise of any corporate duty, cant be given in Evi vs
y Corporation - for an individual is not known as a member of
a corporation, except he is in some exercise of some duty of y
corporation - Post 119, 3 Day 443. 1. Phil 14

V. But where a party's wife in transacting usually made
by wife, makes a contract by consent of husband, if she makes
any ^{subseqt} declaration concerning y contract, at any time, they are
Evi vs husband - as contract to pay a weekly sum

Str 527. 1. Esp 142. Esp Day 121. for nursing a child -

This single. case. is a departure from all y rules of Evi, for
why shd y subseqt declaration be admitted here, more yn in
y case of wages of wife? There is no more ~~no~~ reason in y
present yn in y former case, but on y other hand much less.

She is considered as agent for y husband in yo case -

VI. It is a general rule, yt y declarations of a Servant, or agent, if
made at y time of a transaction, and in relation to it, are allowed
as Evi for or vs y ^{principal} ~~person~~, but if made at any other time, they ^{subsequent} ~~subsequent~~
cant be. for in one case they are part of y Res Gestae, in y other, decla ^{tr} ~~tr~~
they are not. As Servant delivers for his Master a writing, his declarations
at y time relative to it, as yt it was an escrow, or an absolute
deed, may ^{be} given in Evi. They are part of y Res Gestae. 3 TR 405.
Pea Mooley 620. 26. 1. Phil 74. 74. 7. TR 665. 68. 5 Esp 14. 74.
135. 2 Camb 288. 2 Esp 84. note - 10. Res. Gn. 127. Black 14

The same distinction holds as to y declarations of an interfeclor
made at y time of a Contract, made between y parties by whom
he was employed. But his declarations as to y contract made,
at any other time, wd not be allowed as Evi - 1 Phil 77

According to ys distinction, y declarations of a bankrupt
as to y reasons of his leaving home, made at y time of absconding,
may be allowed as Evi with regard to his bankruptcy in an action
by his assignees - It is part of Res Gestae - Peas if made at

any other time, for it is then no part of y Res Gestæ. It is necessary in order to determine can he consented to an act of Bankruptcy, to ascertain the true reason of his absconding, wh can be better proved in this way than any other. 5 TR 512.

VII again in an action by husband on a policy of insurance on y life of his wife, y declarations of y wife made at y time of making y policy, yet concealed from y underwriter, with respect to y state of her health at y time of effecting y insurance, are good Evi vs y husband - for y nature of a complaint can be known in no other way, sometimes - 6 East 188, 1. Phil 181,

So too in a prosecution for assault and battery, either civil or criminal, the declarations of y party beaten made at y time and relative to his bodily suffering may be admitted, but no subsequent declarations, for here y state of his bodily pain, and suffering can't be known by others, nisi by y information, wh they may derive from y person himself. This exception is allowed from y necessity of y case 1 Root 50

VIII Where a party to a suit stands in y place of another, y confessions of y ^{other} are good Evi vs y party, as Executor sues in right of his testator, y confessions of y Testator are good Evi vs Executor, for they wd have been good vs himself - had he been living and a party. 10. John 377.

Now y principle of y^s Rule is, as these declarations wd have been good vs y person himself, they shall likewise be good vs him. who is virtually himself - in another name - 10. John 377.

But there are cases much stronger yⁿ y^s, as in an action vs y Sheriff, for an Escape - y confession of y party escaping, yt he owed y debt for wh he was committed, are allowed for y Sheriff becomes liable for y same debt 4 TR 436. Pea Re 65.

Here y principle is, as y^s confession wd have been good Evi vs y party making y confession of y indebtedness, it shall now be Evi to y same point, wh point must be proved to show damages suffered by y Escape -

So too vs y sheriff for false return, of *non invenius est*^{ed}
 y confession of y party, yt y debt for w^{ch} he was sued, was
 due, & Evi. and for y same reason, it is necessary to prove
 y debt to show y damage sustained. 1. Esp R. 169. n. 4. ~~436~~ R.
 436. Pea R. 65.

It has been once held, yt if a Sheriff be sued in execution,
 for an escape suffered by his under Sheriff, y confession by y
 under Sheriff subseque^{nt} to y time of Escape, might be allowed
 in Evi., but it is now determined yt y confession of y under
 Sheriff shall be confined to y time, y escape was made.
 Pea Evi 1718. 2d Ray - 190. 1. Camb 389. Pea R 65. 11. John
 478. 1. Phil 76. 1 Camb 391. n. 1. Esp R. 168. 2 H. Bl. 279.

So too where a party claims or justifies by virtue of a 3^d
 person's title, y declarations of y 3^d person vs y title, is good
 evi vs yt party. as Trespass vs B. who justifies under
 title of J. S. The declaration of J. S. tending to show, yt his
 title was not good, may be allowed. Swifts Evi 129.

But it is a general rule, where there are several Co Defs,
 y declarations of one def are evi vs himself only and are
of no weight vs y others. 1. McNally 40 Bull R. 243. Keel 18
 269..

This Rule holds in civil and criminal cases, If a joint
 debt vs ~~a~~ two, action vs one only, y declaration of y other
 as to y contract can't be admitted vs him who is sued.

The Rule is then where there are several Co Defs two first
 debtors, y declaration of one not sued, is no Evi vs y
 one who is.

There is an important exception to y^s Rule, in
 an action vs one partner, for company debt, y confession of
 y other is Evi vs him, for each is agent for both.

Pea R 16. 203. Chitty on Bills 209. 1. Phil 72. 3. 11. East. 589.
 1. Taunton 103. In y case of partners y rule is y same
 even after y dissolution of partnership, for they stand in y
 same relationship then as to partnership, as before dissolution

Litt 51.

30 h 236

Soug. 629.

1 Phil 72.

1. Taunton 104.

And y confession of 1. of 2. joint et several debtors, not being partners, is not Evi in an action vs y other to prove y contract, yet y contract being established, such confessions may be proved to take y contract out of y St of limitation, or for any other purpose in Gen, one of ym for y purpose being Agent for both. 6 John 267. Pec R. 15. 205. 3 Day 29. 1. Taunton 104. 1. Phil 72-73.

The principle of y Rule is yd, yt y contract being established they are 'quo ad hoc' in y nature of Partners. It is a fact wh has y effect of a new promise, y act of one being y act of all.

This Rule is not in gen predicible of crimes or trespasses - for it wd be most mischievous to allow y confession. In these y confession of one Def is not Evi to prove y guilt of y other. The acts of each are distinct and independant offences.

But where there is an illegal combination of several, y declarations of one of ym at y time of y transaction, relative to yt as y motive or design, are not only Evi vs him, but vs y others also, (y fact of y combination being established) they being part of y transaction itself, part of y Res Gesta.

6. R 527. 1. Phil 73. 74. 2 Day 265. Secus if made at a different time. The case in Day is remarkable - It was an action for combination to defraud and impose ^{upon} y inhabitants of Boston.

If one of 2 defs suffers a default and y other pleads to y action, y declaration of y defaulted party, may be given in Evi vs y other, and y verdict establishing y liability of both, damages must be vs both, so yt y declarations of y defaulted party are y declaration of a party to y trial, for he is party quo ad y damages. 1. Day 33. Post 121.

In criminal cases also y confessions on exculpation before a magistrate are good Evi vs him on y trial before a Ct of Justice.

2 Hawk. 604. 07. 1. McNally 42. 361. Pea Evi 19. 1. Phil 71. 81.
and it is now settled, yt y confessions of a prisoner, tho Keel 19
un corroborated by any other testimony even in a capital case—
are satz to warrant Jury in finding him guilty, tho it
was olim held insufficient in capital cases—
1. McNally 51. 273. Foster C.L. 243. Lea C.C. 319.

But tis a distinguishing feature of y Eng Law, yt confessions
drawn from y party by torture, or promises of pardon, cant
be given in Evi vs him, It was olim y practice in most
European States to extort by torture or by promises of
pardon confessions of guilt from y prisoner, and then
contrary to humanity use ym to convict him— 1 McNally
44. 2 Hawk. 204. 211. 2 Hale 280. Pea Evi 19. 20. (Eyed
to Contra) 2 Hawk 280. +

With this principle ~~as~~ yt confessions of a party under y idea
yt he is to become a witness in behalf of y king in Eng, or of y
publick in y States, cant be brot vs him on his trial to establish
y fact of his guilt and thereby to produce a conviction—
Lea. C.L. 636.

But a discovery of material facts resulting from confessions
thus obtained, is good Evi as in Theft party by confession states
yt y goods are in a certain place and they are found there—
The statemnt of y concealmt, and y fact of their being found there—
are good Evi to show his knowledge of y concealmt, and
presumptive Evi of his participation in y theft, but his confession
of committing y theft cant be Evi vs him on y trial. In
such case ~~there~~, there can be no danger of y party making
such confessions— being convicted unjustly, when innocent—
1. McNally 47. 8. Lea C.L. 299. 301. Pea 20.

By y Eng It. 1. et 2. Phil et Mary y confession on examination
of y prisoner taken in writing before a Ct of enquiry may
be given in Evi even in cases of felony vs him on y
trial— There is no such It in Conn 2 Hawk 704. 5.

1. McNally 37. 9. 284. 312.

This is one of those *It's* which is to be deemed modern, and ergo not strictly law - It's series & origin of Hen 8th - which is y boundary between ancient & Modern Staty & between those which are binding here and those y are not -

Offer of
Compromise -

There is however a material distinction between a confession - and an offer of compromise - for says Ld Mansfield, men may be permitted to buy yr peace without endangering yr defence - An offer of compromise is never *evi* vs y party making it - Bull N.R. 296. 1. Phil 78. 9. 1. Esp R. 143 - But on bills 208. Pea Evi 18 - Such offer is not even in a circumstan

Evi vs him -

But y confession of a party during a treaty of compromise may be admitted, but y offer of compromise itself cant -

1 Gb R 143. 2. Ibid 475. 3. Ibid 113 - Pea R. 5. 1 Phil 79. B.A.R. 4 Emms 236. 1. Esp R. 143. The confessions of a party are always *evi* vs him, and it can make no difference, an made during such a treaty or any other situation -

Acts of a
Party -

The acts of a party as well as his verbal declaration may amount to a confession and sometimes conclusive *Evi* vs him - Thus if one acts as an Innkeeper and is prosecuted as such, he cant deny y he was lawfully an innkeeper, for as he holds himself out in y character, to avail himself of y benefit, he cant avoid its duties - Secus y Publick mkt be imposed upon and defrauded - Pea Evi 26. 3 L.R. 637. 635. in -

It's a Gen Rule if a person holds himself out to y world in a particular character, to avail himself of y benefits of y character, he shall not deny y character - To avoid y liability arising from it, - as a person living with a woman and holding himself out to y world, as y husband of her, he shall be liable for her contracts, in y same manner as if they were actually married - 2 Esp R. 637. Park 26. 5. L.R. 4. 2 N.R. App. 260 -

In these and all analogous cases, y act amounts to a confession and to confessions wh are conclusive upon him.

Cases of analogous cases - If one person treats ~~with~~ ^{deceives} another, in a particular character and derives a benefit from it, he shall not post deny it to avoid a liability founded on y character. Thus A rented Glebe Land of B y incumbent - In an action for use and occupation, A was not allowed to dispute B's title by proof of Tenancy - again A leases land to B. here - B y lessee shall not in ejectmt deny A's title by proving Mortgage - So where one treats with another as Patentee - he shall not deny that he is Patentee to avoid his contract - 1 Do 7/6. 61. 5 TR 4. 3 Do 632.

Presumptive Evidence -

Presump
Evidence

A presumption is an inference of some particular fact, from those y are proved or admitted -

Direct Evi is y wh cant be true consistently with y nonexistence with y nonexistence of y fact wh it conduces to prove -

Pea 21.

1 Mass R p.

Presumptive Evi is y wh is consistent with y possible nonexistence of y facts wh it conduces to prove -

Example of direct Evi - A testifies yt he saw B take and carry away goods from y possession of P.

But A testifies yt stolen goods were found in y possession of B who was not y owner - or yt B came from y place at or near time in wh y goods were alleged to be stolen - This is presumptive Evi of y fact of Theft in B.

These presumptions of fact from fact may be rebutted by contrary testimony - but till they are they must have y ^{one} ~~same~~ ^{some} weight in favour of y party proving y facts Pea Evi 21 - 1. Mass R. 6. y presumptions arise -

This doctrine of y Law of Evi in the respect to presumptive Evi has been extensively applied to y question of possession or enjoyment in Long Standing, where y subject is not within any pt of limitation. 1 E. to y question y long, uninterrupted

quiet possession of any incorporeal hereditament - Long undisputed,
 adverse possession or enjoyment of a franchise or easement, affords a
 "all presumption y^t it had a legal foundation - and in such cases
 "Presbarr even records may be presumed - The fact to be presumed is
 on y^e Case submitted to y^e Jury under y^e direction of y^e Ct. - Pea 2k 21, 12, Co. 5
 2 Saund 2 Felw. 60. 91. 1. Cowp 103, 216. 1. 1 Ro. 399 - 6 East 208 - Esp. Dig
 175 n 6. 36. 2 Mass 399 - 1. ^{Full} Burr 4th 2 ibid 200. 4 Day 244, 8 Mass
 Ro 136. 1. Bet P. 40a - So a grant of Post date may be
 presumed from long use and a recovery in an action brot, may
 be supported by it - 2 Burr 1468. 3 1 Ro. 159 -

So deeds of land have been presumed after long and quiet
 possession accompanied with other circumstances making it
 probable y^t such a deed once existed - 3 Mass 399 -

So if any other incorporeal hereditament of whatever kind -
 This presumption is of late treated as conclusive, tho' olim
 it was left to y^e Jury to infer y^e facts -

In order to warrants y^e Jury in finding a verdict
 in pursuance of such evi^t is not necessary, y^t they shd believe
 y^t y^e right w^h they establish ever had a legal foundation - or
 beginning - In a leading case cited in Cow 102 - in y^e case of
 Horner vs Kull et Kingston - Id Mansf^d said, y^t y^e Jury
 might presume any thing in support of y^e purchase franchise w^h
 came in question in y^t case, in w^h there was an enjoyment of
 350 yrs -

I have limited y^e rule to incorporeal rights, quia y^e 1st of limitation
 extends to corporeal hereditaments, but y^e same principles w^h applies
 to one, applies to y^e other and on y^e sth principle, y^e rule is founded -

The right to y^e use of a stream of water is an incorporeal
 hereditament - A owner above y^e B below, if a diverts y^e water from
 y^e land of B and B don't object to it during 20 yrs -

B can never after support an action as a for y^e diversion -

Again if B shd by means of a dam overflow y^e land of A
 for 20 yrs, a not objecting during y^t time, A cant afterwards
 support an action for y^e flowage - and y^e Jury are bound to

27
presume yt B acquired y right to overflow y land of A
in y manner he has done -

Right of way is another incorporeal right - If then A has
enjoyed uninterrupted for 20 yrs. a right of passing over y land
of B in an action bro't by B vs A. y Jury shall presume I are
bound to do so - yt B granted a right of way to A by virtue
of wh he has since enjoyed -

The doctrine of presumption is extended to a variety of cases - ^{12. bond it} became break
If a bond has lain for 20 yrs. witht any payment upon it, ^{and} ^{without} ^{suit}
being will. presume, yt it has been wholly pd, in y obligee
can show some good cause or reason, for y delay - some reason why
he has not before made demand of payment. 1. Br P 532. 3 B. Roms
395. 97. 8. Mod 278 - 1. Burr 434 - 4. Byn 1963. 1. T. R. 276
1 B. R. 522. Pea Evi 24.

The consequence is yt after such a lapse of time, yonus probandi
lies upon y. Plt, for by allowing it to lie for such a length of
time witht making any demand - affords a strong presumption ^{it}
yt it has been actually pd, or yt he has released y obligor -

Str 562 Esp Dig. 226 - or 2 part 63 - Cowp 109 -

In Eng there is no St of limitation with respect to bonds
and for y reason y rule is made applicable to ym, for it
is made for y purpose of supplying y want of a St

* This Presumption may be rebutted, as if y Plt was during
y time out of y Country or an alien Enemy - Cowp 214 -
Pea Evi 24 n - Esp D. 226. ~~or~~ or if y debt was very small.

So too if Plt can prove any recognition by def of y existence
of y debt, as if he has pd y interest, or acknowledged y existence of
y debt within 20 yrs. before y time of bringing y action -
Str 826. Id Ray 1307 - or 1370. Pea Evi 24 n.

So too y presumption may be rebutted by proving a prior
ineffectual debt suit for y same debt and it matters not what
y reason was, of y failure for it shows a demand made within

at time, and is evi of y existence of y debt at y time -
1 P.R. 271 Esp. D. 227.

Now as to y question how far an endorsmt of partpaymt
within 26 yrs. is evi of y existence of y debt - The Rule is if
there is an endorsmt made by y ^{Plt} himself, before y times within
wh y presumption wd have arisen, y Endorsmt is good evi -
of part paymt. for he cant be supposed to have made it, for y
purpose of ^{it} becoming evi in his favour, but on y contrary under
a different bias -

But if made afterwards it cant be allowed in
his favour, for so far from rebutting y former presumption, it
confirms it. 1 P.R. 826. 2d Ray. 1507. Esp Dig 226. 27. Pea Ev 24, n 25. n

In Comt there is no need of such a presumption, there being
a St of limitation with regard to the time of suing on a bond -

3 B.C.
307
371

If a Creditor gives a receipt of an instalmt of a debt payable
by instalmt, tis evi of paymt of all prior instalmts, ni rebutted
by contrary evi - for if y prior instalmts had never been paid,
tis not probable yt a receipt wd have been given without
mentioning ym as unpaid - Cow. 103. 1 P.R. 399. Pea Ev 24 -

Where y subject is within any St of limitation, y presumption
cant operate on a times less ym yt prescribed by y St, for it
wd be a virtual destruction of it - Cow 24. Pea 24 n -
214.

Thus y Eng St gives y right of possession to y disseisor after
20 yrs quiet possession, if then a disseses B and holds 19 yrs -
there can be no presumption in favour of A - for ys wd be an
Evasion of y St. or in effect making a new St and one more
strict, wh cant be allowed.

So y St in Comt with regard to bonds restricts y time
of bringing y action to 17 yrs - If then A bring an action on
a bond and B prove no demand for 16. yrs - ys shall not
protect him and for y same reason as before -

These length of possession alone, cant be a ground for presuming a
title to land, or to any thing, but an incorporeal thing -
and applies, ^{not} ~~not~~ within any St of limitation -
only to y^t

Secus y Rule might defeat ally saving of such Pt, wh
cant be allowed - The statute of limitation in Eng gives
y right of possession to y disseisor after 20 yrs quiet possession
But there are several Savings in y Pt in favour of
different persons, as Teme Covert - Infants -

A Teme Covert is allowed to bring an action at any time
within 10 yrs after her coverture, tho y Estate had been in y
possession of y disseisor for 20 yrs or more during her
coverture - If then B enters into y land of C, and continues
in y quiet enjoyment for even 30 yrs during y coverture of C,
yet if C within 10 yrs after her coverture, bring an action
to recover y possession, she shall prevail notwithstanding y
Lapse of time, during wh B has enjoyed - For y length
of possession shall be no ground to presume a title to defeat
y Saving of y Pt made expressly to protect y rights of those
who cd not secus be protected.

So too were y Plff an infant, for y case wd fall under
y same rule, and wd be decided on y same principle -

2 Con R Sumner vs Childs, even in corporeal hereditaments -

Still length of time, connected with other circumstances
of presumption, may be evi of right of presumpt possession - as a
establishes some facts showing title, but cant prove some particular
fact necessary to constitute complete title - her possession may
supply it by presumption - As A is purchaser of lands taken
and sold by collector and continues in possession 20 yrs -
A proves deed to S P. tax due by S P. actual sale by
y collector - but don't prove notice given by y collector -
here y Jury may presume y particular fact necessary
to complete y title - from y possession of A during y time
and y even were his possession but 5 yrs - 2 Con R. Eng -
vs H 3 Mass R 399 - 2 Comt Sumner vs Childs - 50%

The distinction then is y, yt where y subject is matter is
not within any Pt of limitations - long et quiet possession
is conclusive evi of title in favour of y possessor, but

where it is within a St, it is not. But in y^s case he may give in Evi y^s possession in connection with other circumstances to induce y^s Jury to believe y^s existence of good title. On y^s principle in Eng a common recovery has been presumed to supply a defect in a chain of title - 3 Tr 159 - 2 Burr 1065 -

Again an actual Ouster of one of 2 jointenants may be presumed by long undisputed possession of one with rendering any account - Here y^s principle applies in its full force y^s case not being within any St. Cow 217 -

This long uninterrupted enjoyment of any person must have been adverse - i.e. it must have such as is inconsistent with y^s right of any other person - but if y^s possession or enjoyment were consistent with another's right, it can be & no evi vs y^t person, for here is no acquiescence in y^s possession -

And in y^s common case of lands after long possession - Bills - deeds &c, have been presumed to supply a defect in title - 3 Mass 399 - 2 Con ~~207~~ Re. 607 -

Kinds of Evidence -

all Evi is of 2 kinds Written or unwritten or Parol.
 Sec 26. All written Evi is of 3 kinds - I Record II Public Documents not Records - and III Private Writings -

A Record is a written memorial of y^s law^s of a State or of y^s precedents of Justice according to y^s laws and customs of y^s State - Gibb 48 - Bull 233 - Pea 52 - Post 63 -

Hence y^s written memorials of y^s acts of y^s Legislature and of y^s judgments and judicial proceedings of Cts of Record are denominated Records - Gibb Evi 7 - Pea Evi 26 - Bull & A 221-225 233 -

Bull 221. A Record can't be contradicted and y^s Rule is founded on y^s solemnity wh y^s law attaches to y^s writings of y^s nature - If however a Record is made erroneous or defective by

by any unauthorized act, it may be proved by Parol Evi^{21.}
but Evi can't be admitted to prove any allegation made^{necessary} to be
to make it correct, to conform it to y truth and facts of
y Case - 1 Bb Ro 664-4 Burr 2267. 1 Str 200- Pea Evi 26. n 27.

And undoubtedly Evi may be admitted to prove y
an apparent Record is no Record - in fact, but a forgery -
for Secus a person might make Evi for himself - ^{fictitious} 10-10

So too y false date of a writ may be proved, and y true
time of issuing proved for y purpose of furthering justice
and prevent an evasion of y provisions of any St -

2 Burr 350- 3 Bbid 1241- Pea Evi 27. n -

As St. of Limitation requires y action on contract to be
brot within 6. yrs - If y writ bears date within y time -
Evi may be admitted to prove, y y writ actually issued
after y expiration of y time - Secus there wd be an Evasion -

of Law

A Record being a precedent or memorial, open to all, it
cant be carried about from place to place - a record
ergo must be proved by a copy duly authenticated - these
being y best secondary Evi - Bull 225-6. Pea Evi 28- Cill 8.

Indeed tis a Gen Rule y when a writing of a public-
ature, wd have been Evi ^{if produced} a copy perfectly certified shall be -
and for y reason given before - These being in y nature of Records.
cant be themselves produced by private persons - 8ony 572

3 Talk 154- Pea Evi 29- Ld Ray- 154- 1 Mc Nally 356- but a

31

But there are some records wh require no proof, at ^{copy of a}
all such as public acts of y Legislature require none ^{copy into}
in y State in wh they are enacted - Hence they are read ^{over.}
in a printed St Book - not as Evi, but for y purpose
of assisting y memory of y Ct. The Judges are supposed
to know as they are bound to know y law, and ergo there
may be is no necessity of proving ym - but there may
be need of refreshing - Gibb Evi 10- Bull 222-5-
Pea Evi 27. n - y Judges memory -

3 Talk 154
1 Mc Nally
356.
La Ruyons
154-

But Private Sts must be proved as facts, like other
 "Muniments" records wh relate to Private rights - and by Copy - for
 "Law" they are not part of y public law of y land, and consequently
 what a private St y Judges are not bound to know ym or notice ym ne
 is " proved - Gibb Evi 12.13. 12 Mod 126. Bull 222. Pea
 Evi 27 -

And a Printed St Book is no Evi of a private St -
 tis nothing but a private unauthenticated copy and of
 no more validity ym a private - Bull 225. Pea Evi
 27. writing - Post 72. Contra Gibb 13 - not Law.

If however a legislature declares yt a St in its nature
 private shall be deemed public, it shall be so taken, and
 here it has been said, y St Book is good Evi of it -

But I shd rather say yt in ys case there was no
 need of proving y existence of y St, for y Cts are bound
 to know it and to treat it as they wd any public St -

Pea Evi 27. n. - Nor wd it be necessary to plead it
 specially - ths if not declared public it must be -

See Pleading -

Records in Private Sts.

Copies of y acts of y Legislature are certified by y Secretary
 of State - He is y officer appointed for yt purpose and is
 so certified then are no Evi

Copies of y Records of Ct are certified by y Clerk of y
 Ct, if y Ct have one and if not by y Justices himself -

In both cases they are to be authenticated by y Seal of y Ct
 if there be one - secus non -

Subm
 146 -

And all Cts are presumed to know y seals of all legislatures,
 and of all other Cts - of y th States - and of all y States of y
 Union and ergo no other Evi is required, ym y Seal doth -
 y th 9. 153. Gibb Evi 19. Pea Evi 32. 31

of y Recd. Copies of Records under seal are called exemplifications -
 Pea Evi 27. 10 Mod 125. 6. 2 Comt R. 85 -

10 Mod 125 and in Eng y seals of public credit are Evi of themselves -
 Pea Evi 25 and are full proof of y instrument to wh it may be
 affixed - Gibb Evi 19. 1. Sid 146. Plow 411. This Supra.
 2 Comt R. 85. Fil

9 Mod 66. 2 Branch 187. foreign State

So too a public national Seal, proves itself throughout
y world in every Ct, in every nation on the Globe - Post 73 -

But y Seal of any Ct of a foreign country, if it be a
municipal Ct, is not Evi of itself, for it is no testimony
of proof in one Ct of y existence of such Ct in a foreign
country - 2 Comt 85 - 9 Mod 66. 4 Dallas 416. Pea Evi 73 -
2 Comt 187 - 3 East 221 - 2 Comt 90 - 5 East 473 - 3 John 810 -
Pea Evi 72. 73 -

But y Seal of a foreign Ct of admiralty is Evi of
itself - it being established by y Law of nation - Post 73 - Pea 72. 3 -

By St of U S y exemplification of a Record in any
state to become Evi, in any other State must be accompanied
by a certificate of y chief or presiding Justice, or of y Governor -
Chancellor, or Secretary of State, yt y attestation is in
due form and made by y proper officer - Post 62 - 7 N P 133 -
153. So of records

By y Same Law copies or office books, not appertaining Town
to Cts of Record are to be attested by y officer keeping or County
yon and accompanied by a certificate of y presiding Judge - Record -
of y County, or Governor, or Chancellor stating yt it is attested Land
property and by y officer appointed for yt purpose - Register -
and in y form prescribed by law as in y last case - Ibid.
There are 4 kinds of exemplification -

I. By exemplifications under y great seal in Eng, not known here - Comt

II. Exemplification under y seal of y Ct

III. Office copies, wh are copies attested by an officer
appointed for yt purpose, but witht seal

IV. Sworn Copies - these are copies compared with y
original by a witness and proved by him upon oath
befor y Ct Post 63 - Pea Evi 28. 9 - 31. Gill 21. 22 -
Bull 228 -

Exemplifications under y great seal where they are used
are of themselves records and not merely Evi of one and
are y only Evi on a plea of non tiel Record - in a Ct
equal or inferior to yt whose record is called in question

Gill 14
Pea Evi 28. 9
1. John 145
Plow 411. ~
Hardwin 116
108.

33.
The Party
may enq
-ure about
such seals

24.
is not sp

But if y plea of Nul Tiel Record is made in a higher Ct, y original record in y Ct below, on estuward wh cant be done in y other case - Pea Evi 29.

Copies under y seal of y Ct are of y highest authority of any known in ys State, being of equal authority, with exemplification under y Great Seal Pea Evi 29. 30. Gibb Evi 14. 17. 19. 1. Sid 146.

Pea 29
Lamer 40
Plea of
Nul Tiel
Record
But where y record of y same Ct in wh y plea of Nul Tiel record is joined, is denied, y original itself is to be inspected by y Judges - y issue being closed to y Ct and not to y Jury.

Pea Evi 29.
2 East 473.
But where a record is only matter of inducement, y plea of Nul Tiel Record - cant be pleaded, for mere matter of inducement is not issuable - Bull 233. Gibb Evi 26. 1. Sid 145. 146. as if Plt claims under execution title, there y plea. Nul Tiel Record - cant be made, y issue must be to y Jury and y record must be produced to ym - and a sworn copy in such case will be admissible Evi, to prove its former existence, The Record itself by y supposition being lost, such Evi must be admitted ex necessitate rei.

Office copies are grantable only by an officer of y Law appointed for yt purpose and is Evi of itself (Ibid) and requires no proof - The attestation makes it ~~itself~~ Evi per se so indeed are all copies but sworn copies wh must be proved by oath - Post 74. How 110. Bull 229. Pea 31. 3. Gibb Evi 23. 24. 6.

A copy certified by an officer not entrusted by y Law to certify it, is no Evi of itself. (Ibid) (Ibid) Tho' if it be sworn to it may become a sworn copy and be entitled to y credit of a sworn copy - But tho' a record in general is provable only by a copy of some kind, yet if it is made to appear, yt y Record has been lost or destroyed, its existence may be proved by inferior Evi - Post 69. 79. 40. Pea Evi 29. Gibb 22. 1. Bent 257. 1. 1. Mod 117. 1. Falk 285. Bull 228. 256

Where y Record is recent however, there is no need of resorting

the secondary Evi. for by application to y Ct, they will order a new record to be made - This can be done only when it is within y recollection of y Ct. 1. Mod 117. Gilb 22.3. Pea 30. 2 Barr 722

And in general y exemplification or copy to be evidence must be a copy of y whole record and not of a detached part, for a construction might be put upon a part, wh wld be totally different from a construction drawn from y whole record taken together. Gilb Evi 17. 23. Bull 227. 28. Post 66.

These Rules regard y proof, but it is more important to enquire for and vs whom a record is evidence in a Court suit.

Gen Rule - A verdict or judgment is in general evi only between y parties to yt record or judgment or privies to it - but not as to any 3^d persons - for if a stranger to a Record were concluded by it, there wld be danger of fraud by y collusion of y parties - Bull 232. 7. T.R. 112. 2 McNally 624. Carlk 225. Pea Evi 38. 64. Post 53. 69.

It becomes necessary to ascertain what y law means by privy -

Privy may exist between heir and his ancestor, wh is called a privy in blood - Co Litt 352. 3 East 353. wh contain a more extensive survey of Records -

Privy. in

1. Law -
2. in Blood -
3. in Estate
4. in representation

There is a privy called privy of Estate, as yt wh exists between Lessor et Lessee - Grantor - Grantee. Feoffee - Feoffor - Pointenant E3c, as if a record is conclusive on one person, as grantor it shall be conclusive on his grantee in respect to y Estate to wh he claims title by y Grant - Co Litt 169. 352. Bull 232. 232. Gilb 81. 3 Co 23. 10. Co 92. Pea 29. 30.

¶¶¶ There is a species of privy called privy in law - as yt between Testator - Executor - This is called privy in representation - quia y executor stands in y place of his testator - He is ergo. concluded by all his testator wld be concluded by - These are the parties and privies for and vs whom - record^s are evi - there other kinds of privities

Donor -
heir et tenant in
as tenant - and
heir by Curtesy
and heir -

30.
affirming
in another
suit.

too unimportant to be mentioned here - 4 Co 123. 4.

A judgment rendered directly on a point coming in question if y Ct be of competent jurisdiction, is conclusive for or vs y parties to it, and their privies & y privies to y subject matter. "Interest Reipublice ut sit finis Litium"

6 Co 4- 2 BB 827- Bull 232 Pea Evi 34- 6. Cro E. 668- 2 Vent 169- 1. Lev- 235-

Hence when final judgment has been given in a suit by a Ct of competent jurisdiction, it can't be called in question but by due course of law, and it can't be impeached in any other way - as by writ of Error Bill in Equity directly praying relief vs it or in common by a petition for a new trial or an appeal - Pea Evi 36- 1. Day 170-

It can't be impeached in any collateral action &c. in any original action - *Locus Litigation* wd be endless - and justice never obtained - If A then recovers of B, B can't then, post in another action say y judgment was bad, or founded on an erroneous opinion - Pea Evi 78. Willis 36. 1. Day 130. 3 Day 30.

Plead. 116-

62-50

This Rule is predicated only on a final judgment. &c. y^t one who puts an end to y controversy - and it applies to y awards of arbitrators, as well as to any other decision, which terminates y suit as decrees in Chy - Thus if Judgment has been given for def on demurr^{or} ^{or} plea to y action, y plty while it remains in force, can't maintain a similar or concurrent action for y same cause - 2 BB. 827- 3 East 346 352- 53- 6 Mod 20- Chr Ch 4- 3 Wils 240- 304 6 Co 5-

In such a case y way of taking advantage, of barring y second action, is to plead y first judgment by way of stoppel, but then judgment may be given in Evi under y general issue - This is true only of y action of ass't and y^t it can't be in Evi under y gen issue in any other action, but must

but must be pleaded by way of stoppel, for in y action of ass't 37.
any thing wh shows no indebtedness may be given in Ev't
under y general issues. But y same Rule don't hold as to any
other actions - Dea 34 - 6. 1 Esp R. 43-44-

If y right claimed in y second action, was not settled in y
first, y judgment is not conclusive vs y party, vs whom it was
obtained - in a subsequent action - for y merit of y cause ^{not} having
been once determined, can't be again bro't in question.

as if y first action was misconceived, or if y first action
was proper in its kind, but some material allegation was
omitted - In y second it may be supplied - In such case y
right claimed in y second, ed not have been decided in y
first, y grounds in y two being diff't - 2 Vent 169 - Dea Evi
37 - Ray 472 - 3 Mod 12 - 2 Mod 318 - + Bac 116. 17.

Cr. E 667. 8.

So too a judgment for y Plt' is conclusive Evi of y existence
of y debt, and is rendered on confession of def^r or demurr^r - or
or default - 1 Wms R 269 - Rule 232 - 1. Day 170 - Dea 34, 35 -

If then after a judgment rendered for y Plt', y Def prove
yt it was obtained by y fraud of y Plt' or by y perjury of a
witness, yet he shall not maintain an action to recover
back money pd on yt judgment - Dea Evi 35 -

1. L. R. 269.

Nor can y Def vs whom judgment is rendered maintain an
action for fraud vs y Plt' in obtaining it -

The same Rule holds as to proceedings in Chy - 1. Day 130 -
3 Day 30 - Dea 68. 75 -

There is a case in y Books, y case of Moses vs McFarlin,
in wh an action was maintained to recover back money
recovered in a Ct not having jurisdiction of y Defs defense - +

This case has not y authority of 2 Burr - 1006. Questioned in
4 T. R. 269 - 2 H. R. 414 - Dea 35. (+ Because y Ct below had no
cognizance of y case -)

If a person pays money on being sued, asserting yt he didn't
owe it, and yt Ct shd not be precluded, he can't maintain
an action, tho' no judgment given,

held

an action for y recovery of it. The reason seems to be, yt it was voluntarily pd and *volente non fit injuria*. It has been, *trads* quia it had been pd in pursuance of a legal process.

1. Esp R 14. 379. 2 Esp 546. Pea Evi 35-

On y other hand where y Plt^y having recovered part of his demand and attempted to prove y whole, he can't maintain an action for y residue, for y decision as yt part, is conclusive Evi yt it was not due to him - but if he don't produce any proof as to part, he may bring an action post for yt part and y record of y former judgment shall be no bar.

6. Tl^r. 607. Pea 35. 36. 1 Esp R 401-

But in y application of y Gen Rule yt a judgment for a def in one action is conclusive in his favour in an action for y same thing - There is a distinction between real and personal actions - Personal being all of y same degree -

As where
Sustains
D. order

a recovery or bar in any action of y nature shall be a bar to any other action of a personal nature bro't for y same cause or thing - Pea 37. 6. 3 East 258. 9

is bro't
for y same
thing. for
one ^{bro't} ^{bro't} ^{bro't}
was first
bro't.

In real actions on y contrary there are many degrees, some real actions are of a higher nature yⁿ others. and all of yⁿ higher yⁿ personal actions -

Hence a recovery in a personal action is no bar to a real action tho' relating to y same thing or subject. Thus a judgment in (S. B. freight) is no bar to a real action to recover y same close. Neither is a recovery in any one species of real action a bar to another real action of a higher nature - and y reason is, y same right can't from y nature of y case have been determined - The immediate right in demand in y 2 cases is at diff - If a bring an action possessory claiming y possession of a certain close and a judgment is rendered as him - this judgment shall not be conclusive against him in a action for some higher right - 3 East 258. 9

"Lance Cl.
Sustains
D. order"

Tho' there is y diversity in y application of y Rule, there is

no diversity in principle, for in every species of action, y record is so far as respects y immediate subject ^{matter} in issue is conclusive by way of Bar to any future litigation—

Hence if any precise fact is distinctly put in issue and found, y record of yt judgment ever in a personal action is conclusive as to yt fact ~~not~~ is found so as to prevent y parties from putting it in issue in any other action, even a real action— As y Seisin of P was put in issue and found specially for by y Jury— If then y same fact can't post be litigated or questioned in any action whatever by y same parties or privies— 3 East 346. 354. 55. 558. 66 but here verdict operates as y Estoppel. and not y Judgment. Whatever point a Record distinctly decides is conclusive as to yt point, but no farther—

It's said yt to make a record in a former suit conclusive upon any point in another, it must appear yt y point in both actions is y same and ys must appear from a comparison of Records. As where a Plff has been barred in a suit upon a given contract or upon a given trespass, sues afterwards upon y same contract or trespass— Here y cause of action or claim in y two cases being admitted to be y same or proved to be so— y first judgment is conclusive vs y second action by way of Estoppel— 1. Esp R 43— Pea 37— 2 John 224— 24.

Note tis always admissible to show by extrinsic facts, yt y subject in controversy in y two cases is y same or different— Cro Ch. 35— 3 Lev 125— 4 Bacon 17— 12 Allen Hutton 81.

Hence observe y distinction, an a given point or subject of y same nature was in issue in y former case must appear from y record— But an y subject in issue in y latter suit, ^{if precise} is y same as yt in y former may be proved aliunde— ^{identity, &c.} As Suppose 2 bonds or notes of y same tenor et date sued upon in 2 successive actions— To make a bar it must appear from y first record, yt y same Evi as will support y second suit, must have supported y first— 3 Wils 308— 2 John 30—

But in a suit for performing work unskillfully, y record of a former action in wh y Def had recovered of y Plt for performing y same labour, was holder inadmissible, since it didn't appear by y record of y first action (it having been tried on y General Issue) yt y unskillfulness of y work was given in defence in y first action - Of course it didn't appear from y record yt y point was in issue, as y destination just laid down requires - 2 John 24 - Pro-Evi 25 -

And a Prior judgment between y same parties is conclusive as well where y point or matter decided by it comes post incidentally in question - as where it forms y gist of y action or subsequent defence in a subseqt suit - In 12 - Pea 75-6 - Bull 233, 244 - 2 Show 232 - As in ejectmt question of legitimacy of y Plt if there is a sentence of a ecclesiastical Ct deciding upon y marriage of his parents, is conclusive as to y fact of yr marriage -

So in an action on a policy of Insurance, with a warranty yt y ship was neutral - y sentence of a Ct of admiralty condemning her as an ~~alien~~ enemy's property is conclusive - Bull 244 - 5 TR. 196. 434 - 2 East 269-473 - 7. TR. 523 - Pea 76. Doug 554 - (Hob 53 - Bull 233.)

But a judgment is no Evi ^{of} any matter not comes in question collaterally in y former suit - (ut Supra) as if A shd institute a suit vs B for divorce in consequence of adultery with C and B shd plead marriage with C and y Ct shd find it - This wd be no evidence in ejectmt in wh B's marriage with C might be in dispute - for y fact found as to him was introduced collaterally for y purpose of deciding y direct question of divorce - Suppos a witness proved legally infamous in a suit between A & B y judgment wd be no Evi of y fact in a subseqt suit between y same parties -

Or Suppos in ejectmt between A & B, A's legitimacy shd be put in question or issue under y gen issue, y judgment in y case wd be no Evi in a subseqt case, in wh y question of A's legitimacy shd arise - Bull 233. 234 # Able 53 -

And a judgment of a Ct on a point only incidentally cognizable by it is no evi in another suit between y same parties -

Pea 76. In 12. as when a question of admiralty jurisdiction arise incidentally in a Ct of Chy. as a question of contraband in an action on a policy - y judgment is no evi of y fact in any other case - for y action on y policy don't directly involve y question of contraband - yt question arises incidentally - in Evi -

The rule is y same as to any fact merely inferable by argument from y former judgment. Pea 43. 76. In 12. as a judgment upon a bond is no Evi in another case, yt he was legally capable of binding himself by a contract at y time of giving y bond. or a general verdict

And a Prior judgment upon y finding on y general issue is in no case conclusive indeed y judgment itself is no Evi at all, ni y cause of action is y same in both cases, even tho' y title out of wh y right arises is y same - Pea 37. 8. Thus a Prior judgment on y general issue for disturbance or nuisance will not conclude either party in a subsequent action for a repetition of y injury - The causes of y prior mis and subsequent are not y same - tho' y right or title is - Pea 37. 8. In 17. 140. Bull 232. 3 East 365 -

videre A verdict may be Evi where y cause of action is not y same for it is y end of a verdict to determine a particular fact and if y parties are y same - is evi and sometimes conclusive as to yt point -

But y Judgment only determines y right, it can be evi only as y right of action or defence wh was determined by it -

The verdict is here allowed to be given in Evi but Bull 232 is not conclusive and y reason given is. yt y opinions of 12. men - are persuasive Evi on a motion for y - Galt En 29. 30. 308. 1157. 8 mod 386.

But y judgment founded - 2 Mod 142. Carth 70.

If y title or any facts decisive of y right of action has.

been distinctly put in issue and found, y verdict may be pleaded by way of estoppel in another action between y same parties - 3 East 346. 57. 58. 66.

Is important to understand y distinction between y effect of judgment & verdicts on wh subject y writers are silent -

There is an important difference between y judgment & verdict in relation to yr natures, offices, and effects -

A Prior judgment is a sentence of law deciding an right - Pen 37.

A Prior verdict is only evi of a matter of fact - in a former suit, tho' in many cases conclusive evi and - when it is so, and is pleaded by way of estoppel is decise of y facts found by it - 3 East 358-9- 360-5- and conclusive in favour of y party pleading - Pen 37.

A verdict is never conclusive ni specially pleaded by way of Estoppel - a Judgment may be conclusive with being so pleaded and is always conclusive when available in any way or form - 2 Barnwell alderon 662

3 East 346. 1 Salk 286.

The reason is y where a verdict is given in evi under y Gen issue, y question is open to all relative evi whatever and if it be pleaded by way of estoppel, it excludes all other evi, as B pleads a gen release of all actions and y Jury find it - A brings another action on contract made befor y former verdict - B may plead yt verdict - and it shall be conclusive - but if he plead y gen issue - he may give it in evi, tho' it is not conclusive, for its conclusive nature is moved and y question is left open to all relative evi -

In indebitatus Ass't by A vs B. to recover back money paid - B may show under y general issue, y record of a former judgment in wh y money was pd or plead it by way of Estoppel - in either case it shall be conclusive -

See 34.6

The office of a verdict then is to ascertain a matter of fact
 The office of a judgment is to ascertain y right by y law
 on y facts ascertained by verdict or secus, hence a prior
 judgment when Evi at all is conclusive Evi between parties
 to it in relation to y right decided by it and must
 be so from y nature of y case - It can't be presumptive
 Evi merely - This Rule also explains -

Pea 340-7
 1 Day 170.
 1 Lev. 235
 Amb. 756.
 761.

And y Rule of y judgment is conclusive upon y same cause
 of action, when Evi at all applies, as well when given in
 Evi under y Gen. issue (in some cases) as when it is
 specially pleaded -

A verdict may in many cases be given in Evi when it
 is not conclusive - This holds only in those cases, in wh
 y cause of action is not y same - because if y cause of
 action were y same, y Judgment wd be conclusive -

Cases in wh y causes of action in y two actions are y
 same, y verdict wd be no Evi at all -

Thus if 2 parcels of land are held by y same title, a
 verdict in a prior action as to one may be given in Evi
 in an action for y other - but it can't be pleaded -

Bull 232 - Gibb 29, 30, 2. 5 - Gt 308 - 1151. Earth 79 - 181.

5 Mod. 286 2 Mod 142 -

(3 East 365. 1 Ely 42 43.)

But with regard to y case, tho a verdict as to one
 piece is Evi, tis not conclusive Evi - had y subject
 matter in both actions been y same, it wd have been
 conclusive - as action of 6 Ejectmt -

Thus again a Prior verdict may be given in Evi in action
 for continuance of y same nuisance - Here y cause of action
 is not y same - tho y action depends on one and y
 same right - 3 East 365 - Pea Evi 37. 8 - Pleas. 69. 8 -

The case of two successive ejectmts for y same land
 falls within y same Rule - 10. Mod. 1. Pea 37. 8 - 40. Gibb 35. Bull 23.

A Little further as to y action of ejectmt -
In y^s action, tis impossible from y numerous fictions,
it can't appear yt y parties are y same, or yt y cause
of action is the same - so yt y judgmt can't be made
an Estoppel -

Tis said by Brift a verdict can never be evi ni as to y
facts specially found by ym - But y^s Rule seems not to be
law - In. Evi 18.

The true rule is, yt a verdict never can be pleaded by way
of Estoppel ni y facts be specially found - as action for a prior
disturbance, y verdict may be given in Evi in a subseqt action
for a continuance

So as to verdicts In gen then a record of a former civil suit is no evi in a
subseqt action as to y facts or rights determined by it, ni as
between y parties or privies to it and not as respects 3^d persons.
3 M 29. 32. 3 as to 3^d persons then y answer is res inter alios acta.

2 La Ray
1252

They had no right to interfere with y^s proceedings.

As y benefit ought to be mutual, since y record shall not
operate vs a third person - he shall not produce it in his own
favour - Hardr 492. Gibb 36. 3 Mod 141. Bull 232. Pea 38. 64. 68. 76.

But it is said yt y^s rule dont hold universally - There is
a particular class of cases in wh it is not mutual - Thus tho
one who is privy in Estate, may produce a verdict in his own
favour, tho if y verdict has gone ^{for} y other party, it w^d have
been no Evi vs y privy - as a sues B in ejectmt as tenant for
yrs, y^s verdict may be given in Evi in a subseqt action by A
vs y reversioner of y same land - A was party to y first action -
Gibb 33. 5. Pea 38. 39. La Ray. 730. Bull 232.

So if there are several remainders limited by one deed, a verdict
for y remainder ^{one} man is evi for another of ym vs y same
adverse party - But a verdict vs y first remainder man
w^d be no Evi vs y second - Bull 232. Hard 462. Pea 39.
In 19. 19. So as it seems if y first action had been vs

tenant for life - Led Contra vide Gilb 345 - Bull 232 - Pea 39 -

II. But y Rule y t y record is no evi ni as between y parties or privies, is subject to several exceptions

Thus when one person sues for his own benefit, y name of another as party to a Suit, y verdict may be evi, tho' not conclusive for or vs y former, as in y case of successive ejectm^t - for y same land brot in y name of different Lessees by one Lessor - Pea 40 - G. M 35 - Bull 232.

In such case y verdict in y first case is evi for or vs y Lessee in another Suit

To a verdict vs A who justifies as Servant of ^{LP} B (tho' not conclusive) is evi in a subsequent action by y same P^t vs B. B justifying as Servant of P^t for a repetition of trespass - for P^t in y case like y Lessee in y Tail is virtually, tho' not nominally y party in both Suits - Doug 517 - Technically, vs B & Co - Pea 40.

III There is another exception when y point in dispute is a question ^{a private} of public right - In such case a verdict finding, or disproving y right will be evi to yt point in a subsequent action between other parties - as a verdict finding a public right of way - y right of a City, to toll - the Duty of a Parish - or any custom in general in an action vs B - will be evi in an action vs C - turning upon y same point - Pea 40 - Peo R. 156. Gilb 36. Parth 181 - 1. East 550 - Pea R 219.

Thus in trespass vs A who justifies under a public right of way - a verdict vs him may be given in evi, vs B in a subsequent action of trespass vs him, when he defended in y same right - & E Converso - The case in East contains y example -

In no one of y above cases is y verdict conclusive - quia y parties not being y same there can be no Estoppel

The Principle of y last exception probably is yt as y right in question is a public one, every individual is in some degree interested in it, and might be either benefited or injured by y first determination upon it -

40.
12. executing
themselves.

or decree

IIII The Sentences of Cts whose determinations are 'in rem'
as Cts of admiralty are generally conclusive *vis* for or *vis*
all persons, an actual parties or not, for all persons may
become parties and of course are potentially such - Besides a sentence
of condemnation acting directly on y subject, is in y nature of
a conveyance or transfer of it, like an execution title -
8 "R. 196 434- 7 "R. 523- 681 5 "R. 255- 2 East 268-
2 B. B. 977- 1174- Mars on Lr. 288- 292- 328. 614.

Whenever therefore matter determined by such a Ct. comes post
in question incidentally in a civil case in a Ct of C Law -
y sentence is conclusive - As question of neutral property
determined in a prize Ct & y same question post arises at C L
in an action vs y underwriters - The sentence of former Ct is
conclusive - 5 "R. 255- 8 "R. 196 434- 7 "R. 523- et auc *Supra* -
Note it must come incidentally in question at C Law, if at
all - as C L. Cts have no direct or original jurisdiction
or cognizance of such subjects - It can never come in question
directly -

V The Rule, it has been held is y same and for y same
reason, as to y sentences of Cts having jurisdiction of y Probate
of wills & granting administrations &c - In yrs cases, as in y
former y sentence granting probate &c. is conclusive upon
all persons and even in criminal prosecutions - 1. Day 170 2 Day
312- as to criminal prosecutions - however y rule has lately
2 The Rule has been denied - 3 "R. 125- 1. Lea 235- Pea 88. n. - Lewch 103
429
2 The Maley Thus suppose A sues B in trespass claiming title as Executor
of P. B denies y title of A as such - In y case y sentence
of y Ct granting probate of y will and letters testamentary -
is conclusive -
+ 50.
438-
450
461

So too A sues as y Executor of P. on bond & B y def denied
yt he was Executor and offered to prove y will was forged -
but was not allowed so to do, y sentence of y Ct being held
conclusive - 1. Lea 235-

On Indictment for forging a will, probate of will on y proper
 prerogative Ct was held conclusive. Str 618. 713. Leach C.C. 418.
 But y is now denied by Ld Ellenborough in Rex vs Gibson
 1802. 1 Phil 247 as regards criminal prosecution vide Leach
 C.C. Cases 113. 9 McCall 429- contra but then y probate was void-
 y supposed Testator being alive and so no jurisdiction - vide Henr-
 McCall 430-

VI. So also in general y sentences or judgment of ecclesiastical
 or prerogative Cts are conclusive as all ~~the~~ persons on y question
 arising incidentally in a Ct of C Law. 12. in matrimonial cases
 as upon questions of marriage or divorce. 23. Amb 756. 62. 63-
 Pea 44- Pea 76. 78- as Question of legitimacy in erectmt.
 a Prior sentence affirming or annulling y marriage of y Parents.
 is conclusive - Pea 77. n- 1. C 29- 7 C 41. Carth 225. Str 961-
 Amb 756. 762.

So in an action vs a man by a creditor of his supposed
 wife for a debt vs her while sole, a prior sentence of vs y marriage
 is conclusive vs y Plff. Pea 78. n-

The Reason of y Rule in these last case is, probably - yt as y
 sentence is in a nature of a proceeding in rem it ought to conclude
 all persons. Third persons neither are or ed become parties to
 it. For a different determination even at C Law between 3^d
 persons wd necessary impugn y sentence - of ecclesiastical Court.

But a determination at C Law vs y prevailing party
 in a prior C Law suit, in favour of y party to y prior suit,
 wd not impugn y first judgment - Thus if y Parents of A
 are divorced in y ecclesiastical Ct and A shd post recover
 as heir to his parents - y wd be repugnant to y sentence of divorce
 but if A shd recover in Desseisin vs B. and C shd post
 recover vs A, there wd be no inconsistency in y two
 judgments -

It is Evi on y same principle on wch an execution Little
 under a judgment vs A is Evi of y Plff in y execution vs all
 others or on wch a deed of land from A to B is Evi of title
 in B vs 3^d persons. - for y sentence of what it confirms, it establishes or annuls

It don't merely like a C Law judgmt ascertain a right and award its enforcement but executes itself -

Such sentences however are not conclusive vs y king or a public prisoner, as upon an indictment for bigamy if it is said quia y king cd not become party to y proceeding ~~the~~ quia y fact in question considered as a crime, was not cognizable by y ~~electorate~~ Ct - Pea 18- 1. Ps 261- But yd last reason wd hold equally in y case of forgery- (ante)
Phil 24- 247

And in y former cases individually who are strangers to y proceedings may show yt y sentence was obtained by fraud and collusion between y parties - or any other fraud upon y Ct - these being extrinsic facts wh vitiate y most solemn proceeding. for it may be averred ever in a collateral suit, yt a Ct was misled by fraud - but not yt it was mistaken. Per 67 68. 9- 262- 2 Des. 246. Comb 762-

VII. So where a judgment in a former suit forms either y whole or a part of y cause of y action, or defence in another, y record of it may be given in Evi in y latter for or vs a stranger to y former action. Thus where one has been compelled to pay money to another and sues for a reimbursmt, he may give in Evi y record of y Recovery vs himself, not indeed for y purpose of proving any of y facts wh appear in y first record, or y right wh it imports to establish - but for y purpose of showing y single fact, yt a recovery to such an amount has been had - ys being an necessary part of y Res Gesta and provable only by Record - The record is itself, in such a case of y facts wh constitute y cause of action as where a surety has been compelled to pay for his principal - or a Sheriff for y default of his deputy - a master for y injury done by his Servant - and indorsee for y acceptor of a bill. In each of these cases if an action is bro't to recover an indemnity vs y principal or wrongdoer - y prior recovery may and must be proved by y record of y first suit.

Pea 288. In. 14. for in these and similar cases, y prior suit and its consequences constitute y ground of recovery in y later case -

So also in an action of Covenant of warranty, the Plt may give in Evi y record of y Suit, by wh he was evicted, for y²² purpose of showing y fact of his eviction - but not y title was in Evictor, ni y covenantor vouched in - Gilt 28 - Bull 22 1. Roll 396. Pea 39. In. 19. and if y covenantor was vouched in in y prior Suit, y record is conclusive of y whole ^{case} - vide Cost Broken - y²² 22

And in an action on covenant of warranty of title to a chattel - (as a horse) y Plt may for y purpose of proving yt he has lost y property, give in Evi a recovery vs himself by a stranger for y same chattel, but not for y purpose of proving yt y title was in Stranger - 1 John 517. In. Evi 15 -

Note in y cases cited, y Plt gave notice of y Prior Suit to y Def yt he might appear and defend y title - But these was notice necessary -

So a former satisfaction obtained by y Plt vs a stranger - for y thing or matter in demand, had been barred. 12. former recovery vs P for y same Trespass & for in y one case, y former recovery constitutes a part and in y other y whole of y defence -

Co L. 73 as if A et B jointly, commit a Tort on P. now if P sues and recovers vs B and sues B. B. may plead y former judgment in bar - see Aft Battery or Trespass - one recovery -

VIII - In cases also in wh a party to a suit derives his title from a judgment in a former suit between himself and stranger - he may give y Prior record in Evi, ^{tho} where in judgment either The party claims an execution title under a judgment of his own vs P. he may shew y judgment in Evi, for y record in y prior suit & y proceeding upon it are ^{and} in y nature of a common assurance - In. 14 - and are ergo admissible upon y same principle on wh a deed from P. wd be - These

however are not Evi of y^e title was in D^r but only of y^e fact
 of whatever title was originally in him, is now in y^e party
 who recovered judgment vs him or recovered y^e deed from him -

Crim^t
 Case.

An y^e verdict in a criminal case can be used as Evi of y^e fact
 found by it, in a subsequent civil suit, is said to be a point
 not clearly settled. Pea 44³ 84, 88-9. Phil³ Bull 22. 25-4 East
 1 Phil 378 577. n - 581. Cowp 9. 157. There has been indeed some
 contrariety of opinion ^{upon} upon y^e subject - but according to y^e Gen
 principles of y^e Law of Evi and y^e weight of authority, it seems
 not to be admissible - Bull 245. Park 41. 146. 148. In Re-
 Str 311. Park 283. 1. Sid 325. Gilt 30. 2.

The well settled rule of admitting y^e party injured by a
 public offender (in y^e single case of forgery) to testify vs y^e
 offender upon a criminal prosecution for y^e same offence, seems
 decisive of y^e verdict is not Evi in a subsequent civil
 suit - If it were, he could not testify Post 109-110.

But y^e Record in a prior civil or criminal case is Evi in a
 subsequent case as a part of y^e "Res Gestae" to show y^e such a course
 of action was true or existed, tho y^e suit or prosecution was vs
 diff^t persons as on an indictment for perjury, of y^e Record of y^e prior
 case in w^h y^e perjury is charged to have been committed, is Evi
 for y^e purpose - Bull 242³ - Pea 48 -

So in an action for malicious prosecution, y^e record of y^e
 former prosecution is evi of y^e former prosecution - Ibid.

A verdict however with judgment in a former suit is in no
 case Evi of y^e facts found by it, till final judgment has been
 rendered upon it - for till y^e is done, it can't appear an
 y^e verdict stands or not - Pea 49-58 - Str 161 - Bull 243³ -
 1 Phil 292 -

The verdict however and not y^e judgment furnishes y^e only
 proof of y^e fact found by it - The judgment is necessary only to render
 y^e verdict admissible -

But y^e Rule don't apply when y^e purpose for wh^y record
is offered in Evi, is meant to prove y^e fact y^t such a former
trial has been had - In these cases y^e Postea in y^e former suit
is alone satis as in y^e above case of perjury - for in cases of y^e
kind tis immaterial an y^e prior verdict is established or set aside -
it not being offered as Evi of facts proved by it - Pea 50- Bull 243.

And a verdict upon an issue out of Chy with a decree in
pursuance of it is Evi, for y^e decree is, for y^e purpose of establishing
y^e verdict - equivalent to a judgment at Law - Pea 50. Bull 234 -
Phil 292.

As to Writs when records and when not - when provable
by copy of Record, and when only by itself - vide Gill 38, 40.
Bull 234 - Pea 50.

Acts and proceedings of Congress and y^e records of
y^e Cts of y^e U S - are proved as our own Cts and records
are, y^e constitution and laws of y^e U S being binding upon each
State ^{and} part of its Laws. Inr- 67 - each state in its own way.

Under y^e constitution of y^e U S, as construed by our Cts, judgments
of Cts in y^e neighbouring States are of y^e same solemnity as our own -
1 E. conclusive - Inr 67 - 2 Dall 342 - Cons U S Art 4 -

In y^e neighbouring States, y^e decisions have been contradictory -
2 Dall 302 - 2 Mass R 304 - Cani 460 - 1. John 426 - 1. Dall
188-9 - 219 - 61 - 5 John 39 - 37

But now in N Y y^e Rule is pretty much y^e same as ours - 8 John.
8 John 173 - 186 - The Rule established here is now adopted by y^e
S. Ct of y^e U S (See Debt 7) y^e Branch 481 - 3 Wheaton 234 -

As to y^e mode of proving y^e legislative acts and judicial proceedings
of our neighbouring States - See It Count 457 - Inr 67 -
U S vol 7. page 151 ante - Art 4. Sec 1 ^{4th}

Public Writings ^{not} and Records

These ^{are} somewhat of y^e nature of records being documents or memorials
preserved at a fixed place by public authority and for y^e use
of y^e Public - They also import or constitute Evi in themselves.

and are regularly in point of solemnity & highest species of
Evi - records only excepted - Gibb 47- Bull 234- Pea 57-

They are generally proved as records are (viz by copies
examined and sworn to as true - Pea 53- Bull 234-
or by
office copies. 235- Gibb 49- 56-7. Corp 17- 590- 2 Burr 1189- Pea 37-8.

As to y mode of proving copies of y records of neighbouring
States - in y U.S. - see ante Sec 49- vol 7. p. 153- In 7.

Writings of y description are not called Records, quia
they are not presidents of justice according to y laws and
usages of y States - Gibb 48- Bull 235- Pea 52-

acts of y
legislature
are Records. of y nature are II- Journals of y legislature -
Copies of these examined and proved by a witness, are
rec^d as Evi - Pea 53- Quere are they not provable by
office copies - also E

But a Mere Resolution passed by either house of
legislatures -

as a foundation for ^{other} proceedings, is no Evi of y fact
resolved, as a resolution yt a certain publication is a libel
or yt a certain plot exists - and during a prosecution for y
offence, is no Evi upon y trial of y cause, of y fact yt it was
a libel - or yt there was a plot - Pea 59- 4 State Trials
39- 53

III The Memorials of proceedings in Ct of Chy - These are not
strictly records by y Eng Law, quia y proceedings are not strictly
presidents of justice according to y laws and usages of y State -
but decisions or determinations secundum bonum et equum -
kata concieie - Pea 50-51- Gibb 48- Bull 235-

With us they are regarded as records and a writ of error
lies to set aside decrees of Chy -

The bill in Chy is now regarded as Evi for y purpose of proving
y fact yt such a bill was filed or such other facts as may
be proved by hearsay Evi or reputation as a pedigree &c -
for y allegations in y bill are regarded merely as y statements

of Counsel to compel an answer - Pea 12.54- 7. JR 23. n.a.
159- for y^{old} rule see Lid 220- Bull 235- 2.3.

51

But an answer in Chy is evi vs y party making it - Gilb 50.
for it is a confession of y most-solemn kind being made
under oath - Pea 54 Gilb 526. Bull 233- 2 Ben. 194- 288-
Gilb 50- tis however but a confession and of course only
admissible where a confession under a different form wd be
admissible - Hence an answer for an infant by his Guardian
is no evi vs y former in a subsequent suit - Pea 54- Carth 79
Bull 237- 2 Abent 72- 3 Mod 259- Nor is y answer of
of a Trustee evi vs y Estate Due Trust. Bull 237-
A confession as such is only evi vs y party making it - and
how far a woman may be prejudiced by an answer made by
herself while Covert is not fully settled - Pea 54- 3 PM 225-35-

But an answer by one of 2 partners in a suit vs him by
a is evi vs him, y other partner even in a suit vs him
by Pea 55- 3 Cases 16.203- Doug 629- Chit 209, ante 24-

So a voluntary affidavit by one jointly interested with
another has been admitted in one action vs ym both - Pea
55- Gilb 51-6-7- it being y confession of a party to y action
and in interest - This however is not strictly of a public nature
for y affidavit is extrajudicial - Gilb 56.8-

But in gen a copy of y whole answer and not of not of any
particular part only must be exhibited as in y case of judgments
and indeed of all written Instruments - and confessions -

Pea 34-55- 5 Mod 10- Bull 227- 37- 2 Bent 174- 288- Gilb 56-

And y party who made y answer is entitled to make a second
answer put in upon exceptions to y first & in explanation of it -
Pea 55- 1. Lid 418-

As y party who^{se} answer is produced in evi in a subsequent suit
is concluded by y admission contained in it vs himself, so
on y other hand y averment in it made in his own favour
are evi for himself - The opposite is not concluded by y latter

but is at liberty to contradict you by other evidence or to insist from circumstances or presumptions, yt they they are not entitled to credit. Pea 55-6-7. Gibb 50-2 bent 194-288.

In one instance part of y answer may be read as Evi - viz to show yt one offered as a witness is interested in y Event of y suit - Secus y very attempt to exclude him and introduce his testimony as given in y answer. Pea 59. Bull 288-

An affidavit by one of y parties nth has been used in a case is of a nature similar^r yt of an answer^{answer} and probably in y same way viz by copy. Pea 59.

But a voluntary affidavit being of a private nature can't be thus proved, y original must be produced as in y case of other private writings - as deeds and must be proved to have been sworn to. 12 affidavit by vendor yt an Estate sold is not unnumbered. Pea 57. 58. Gibb 55-6-7. 1. bent 53-413. La Ray 311. 734-893. 936-
57. 288.

If a man make a voluntary affidavit perjury is not predicable of it - it not having y sanction of an oath.

Depositions used in a former suit are also Evi between y same parties on a subsequent trial, if y deponent is dead or not to be forth - Secus they are not in gen admissible they not being y best evi - Pea 58. 59. Gibb 61- Park 275-64- 281- 4 Mod 146- Bull 289- 1 McMalley 14- 283- 285- 87- 286- ante - 19 post- 239

They have been said however to be admissible when y deponent being subpoenaed falls sick on his way - to Ct - Gibb 60- 1. Mod 283- 84- Sir 920- Bull 239- Sed querean y is any thing more yn a ground for postponing y trial - Pea 59- 5

But a deposition of a witness like any written or verbal declarations of his may in all cases be introduced to contradict his testimony - The deposition however is not used as Evi in chief i.e. of y facts stated in it but to invalidate y testimony of y witness - Pea 58. 59.

I G. an y deposition of a witness whet y time was disinterested but who post by operation of Law becomes interested and a party can be used in Evi - y opinions are not agreed -
 1E. by becoming heir - or Executor or administrator to y party to y original suit - The better opinion is in favour of admitting it - Pea 58-59 - Plr 101 - Bull 286 - Eps - 786 -
 2 bent 699 - 2 bes. 42 - 2 attk 261-5 - 1. P Mm 288-89 -

Depositions to perpetuate testimony or de bene Esse may be taken under y direction of Chy - on a bill for yt purpose - Hinc, when y witness resides abroad or is about leaving y country - Chy or in apparent danger of death - In y 2 last cases y depositions 332. are not Evi, till y contemplated event happens - Pea 60 -
 1. Bull 240 - 3 P Mm 313 - Path 691 - For. 114-15 - Post - Hand 315 -
 3 Bbl 383.

In Count y supremem Ct as a Ct of Equity, are empowered to take depositions of y kind upon a bill for yt purpose - The usual notice is given to y adverse party and y deposition is taken by a commissioned appointed for yt purpose by y Ct -
 Ct-Count 237 - For. 115 -

But depositions like verdicts are only evi as between y parties to y prior suit in wh they are taken and their privies - Pea 64 - Bull 239 - Gibb 61 - 1 attk 445 - 3 attk, ^{515, 24} Excepting as verdicts.

To introduce any interlocutory proceeding in a Ct of Chy in Evi - proof of y prior stage of y suit is necessary - Thus to make y answer admissible y ~~title~~ must regularly be proved and so of y subsequent proceedings - for it can't cease appear yt y answer was made in y regular course of judicial proceedings - Gibb 55-6 - Pea 66 -

But if y bill has been lost or destroyed - it may be proved like all other documents in such cases by parol Secondary Evi - Pea 67-29 - 5 Mos 24 - Gib 22 - Bull 233 -
 1 Vent 208 - 2 Heble - 31 -
 211 288.

priv

A Decree in Chy is Evi whenever a judgment at Law. may be so

The first thing I noticed when I stepped
 out of the car was a warm blanket of
 sunlight. The air was thick with the scent of
 blooming flowers, a mix of earthy and sweet
 fragrances. I took a deep breath, feeling the
 sun on my face and the gentle breeze on my skin.
 The world around me seemed to be in a state of
 perfect harmony. The birds were singing their
 hearts out, their melodies weaving together in a
 symphony of nature. The children were laughing
 and playing in the park, their voices adding to the
 overall sense of joy and peace. I felt a sense of
 belonging, as if I had found a place where I
 truly belonged. The sun was shining brightly,
 casting a golden glow over everything. The
 colors were vibrant, the smells were intoxicating,
 and the feeling was indescribable. I was home.

The same Rule and exception apply regularly to both - This 55.
it is in general Evi as between y parties and their privies -
Succs when y right ^{decided} by it, is of a public nature -
Pea 64 38 - ²²² Gilb 29 - Doug. So of Mor Co-ep^d to a Judgment.
G M 32.3.30. Bull 232.

The proceedings in y Ct of admiralty (in Eng) of ecclesiastical
Cts are Evi of same nature and authority as those of Equity -
This Rule supposes y Ct to have had jurisdiction of y subject
matter - As y probate of a will - sentence in a matrimonial case
cause or ^{cave} cause of Prize - Gilb 67. 10 - Pea 69 - 2 Mod 231-2.
1 vent 258 - 4 S.R. 258 - 3 S.R. 125 - 1. Sid 359. Ray. 405 -
1. Roll 673 - 1 Vern 53.

In these cases y judgment or decree is conclusive as a judgment
of a Ct of Law - tho it is allowed to show y seal of y Ct or
or rather y proceedings are forged - for y^s don't control y
sentence - but shows yt none exists - Pea 69 - 1. Sid 359. Ray 405.
These proceedings are provable by copy as other public
writings are - Gilb 71-2 - 3 Salk 157 - Doug 472 ante 34 -
572

As to y proceedings of inferior Cts in Eng. their effects. their
mode of proof - vide Pea 75-4 - Com Dev. C. 1 - 2 Bb. R 535.
The judgment of a foreign Ct is Evi here either conclusive or
prima facie of y fact not it imports to establish - or y facts
it professes to find - Pea 70 - But as to y judgments of foreign
municipal Cts - y^s distinction is to be observed - If y party
claiming y benefit of y judgment - apply to our Cts to enforce
it - its but prima facie Evi of his claim, for as he voluntarily deny
submits it to y jurisdiction and decree of a Ct here - y Ct is in
will examine y merits by enquiring what y foreign law is - Point
and an y judgment is warranted by it - But such judgments of fact or
when used by way of defense to an action, here, is conclusive - Law.
as a judgment of our own - Pea 70 - 2 H Bb. 410 - Doug 11 - 1. Pea 70.

Such a judgment may be proved 1. by an exemplification under
y national seal, y seal of one nation being supposed to be known
to y Ct of another - 7. Mod 66 - Carth 85 - Dv. 8 - Pea 78 - n 3 -
2 Comm R, 85. 73. n 3

501
2 Com 685

1 Phil 401
By a sworn Copy - 2 Branch 187 - 5 East 433 - Phil 20, 354

with y Seal
of y Ct.

Pladd 63 - anter 36 - III by y attestation of y proper officer -
of y Ct - But in y seal must be proved as any other matter
of fact - for y seal of a foreign Municipal Ct is not supposed
to be known here as is yt of a Ct of Public Law - Pea 72 - 3 -
3 East 321 In evi 7-8 - Gills 20 - 1 Phil 301 -

Foreign Edicts &c. may be proved by copies under y
national Seal or by sworn Copies - 2 Branch 187 - Dr. 9.

By y Sts of Count y printed Sts of y several States - of y Union
transmitted by their several executives or legislatures - to y
Gov. of y State - deposited by him in y office of Secretary -
of State - and exemplified by y latter's seal are admissible
in Evidence -

Pea 73 n.

Unwritten foreign Laws and customs can't be proved by common
parol Evi - but y testimony of respectable, intelligent persons of y
foreign Country is proper Evi - 1 John 385 - 394 - 1 Ann 434 - 1.

In 9 - 3 Ep 58 - The unwritten Local Laws of y several States
are often certified with oaths by professional gent of neighboring
States - There is any Evi is any evi proper but yt of professional
Men &c

Part In
353.

The Sentences and proceedings of foreign Cts of admiralty upon
subject within their jurisdiction are conclusive of y rights and facts
wh they import to establish - for as these Cts decide by y law
of Nations wh is a part of y law of every civilized State. Their
judgments are not regarded as y sentences of foreign Cts -
Pea 70. 18 - 8 St 192 - 232 - In 7-8 -

Part In
353.

forma

And if they state y Evi on wh they find a fact, no Ct here
can enquire an yt Evi was satis is warrant y finding -
In y case however y adjudication is evi of y fact by way
of conclusion - as yt of property was an Exempt - not of y particular
facts stated in Evi - The latter appears in substance by way
of Recital - Park 71 - Pea 71 a - 71

If such an Ct. passes a sentence or makes an adjudication witht assigning any cause, tis conclusive - 1E. as condemnation of a Ship for being spoken too on her voyage by an enemy - as lawful prize - yt she was not neutral - Pea Eri 11-2 Park 413.

But if it appear from facts and y conclusion founded on ym yt y condemnation was for any breach of y law of nations - but for a noncompliance with some arbitrary municipal regulation - of y foreign State y Sentence is void and of course no Eri at all 1E. condemnation quia spoken too or visited on her voyage by an enemy - Pea 71- 2- Park 415.

7. LR 523- 8 LR 434- 562-

of Eri

And no admiralty has any effect by way or secus ni y Ct wh rendered it was regularly established by y law of Nations - Pea 72- 8 LR 268- 2 East 473- 1E- French consular Ct established by Bonaparte - in Spain Portugal - not recognised by y law of Nations - are not recognised by law y States -

Proceedings in Ct of admiralty are provable by copies under y seal of y Ct - This seal proves itself - for as y Ct acts under y Law of Nations - all Ctj are supposed to know y Seal - Pea 72- 73- The Public Seals of one Country - prove themselves - Private Seals do not - as y Seals of individuals - of Corporations - or Counties - Towns

So for a Seal of a foreign Notary Public this officer being established - by y public Law - This Seal and attestation are y usual Medium through wh y facts verified by oath or certificate sometimes - officially by himself, are proved - in all foreign Tribunals Pea 74- 2- In 8- 10. Mod 66- 1 E 15 53
2 Roll Co 346- Bills of Exceptions - Pea 73. 4.

9. 10
20.
8 LR
303.
1 E 15 53

A municipal Co is established by a
Municipal Laws of a State.

In Court. a St provides, yt a printed
St of a seal state, in a minor transmitt
to our Court by the Executives of a seal state, and
deposited here. are good Evi when
exemplified by a Court Secretary here.
The seal Executives exchange the states
of a seal state - and a Secretary exemplify
a whole book. by impressing it with
our Seal -

I heard a whole course. 28th ap^l 1827.

How far are known by a Ship Captain.
are Evi -

The Rule. is. such host is no
Evi of a fact wh it states,

An award upon a submission to arbitrament is as conclusive as the judgment of a court established by law. (Peake 75.) } For an award is in the nature of a judgment. And altho' an arbitrator cannot actually transfer real estate by his award, yet he can order it to be done and his determination upon the point of title, will be conclusive in ejectment Peake 75. 3 East. 15 (ante 44.) A protest by a ship captain is not evidence ^{in chief} of the facts it states in an action upon policy. But it may be read for the purpose of contradicting the testimony of the person who made it. 2 Esp. 490. 690. Sw. ev. 123. 1 Doug 96. 91. Marshal 616) Sworn copies of regular entries in the books of the executive offices of Government are admissible as evidence, E. G. of entries in the books of the treasurer or comptroller of the state. or U. S. ex. Sw. ev. 223. are not office copies also? — notes

1 Day
2 Count
2. 66.

The same rule held as to notes of proceedings in corporations entered in the books. ex. gratia of Banks, Per 93. 307 insurance companies. Etc Sw. ev. 23. 2 Mc. Nally 475. Pen Cri 90. 1. 93. 307. Doug 937) But when a document is in its nature private, tho' belonging to a public body, the original must regularly be produced. ex. q. a letter belonging to a corporation Peake. 90. 1. Stra 401.

But the declarations of an individual as such, are no ev. for or vs the Corporation (Sw. ev. 23.) for corporations for corporations act and speak only by their votes. (ibid) A gazette published under the sanction and control of Gov. is sufficient ev. of an act of the State. Pe. 77. 8. Sw. ev. 23. 5 L. reports 4, 36. Bull. 226. 2 Mc. N. 479.) as of embargoes. blockades, regulations of trade, declaration of war, — So of proclamations of Gov. and addresses of the people to the executive ^{and} legislature, Pe. 77. 5 9. 436. Bull 226.

weir no
such ev
in S.

The register of the Navy office is ev. of the death of a seaman. Pe. 79. Sw. ev. 23. 2 Mc. N. 475.

2 no. 475
time of
admission

The books of a public prison are ev. to shew the time of a prisoner's discharge. Etc Pe. 79. 3 Boss. 188. So of the

logbook of a man of war to prove the time of sailing, with convoy. 1 Ep 427. Pe 79. In ev. 28. or other facts of that nature.

As to

National
History.

A general History it seems, is ev. of such past events and facts of public nature, as admit of no other proof; but it is no ev. of matters of private concern, as of a particular custom. Pe 79. 83. 1 Salk 281. 12 Mod 85. 1 W 149. 1 R 14. Bull 248.
284 In ev. 23. - contin

Surveys and inquisitions taken by the authority of Gov. are ~~and~~ ^{evid} between individuals, tho' not named in them as Doomsday books, in Eng^{la} surveys of ports &c. Pe 84. Hob 188. Gill 78. 1 Burr 146 Pe. cases 182. 1 Wils 170 In 24 - Reports

Such public acts being entitled to a high degree of credit. Secus, of private inquisitions, as ~~are~~ ^{one} taken by a Sheriff to ascertain the ownership of goods seized in ^{execution} ~~at~~. This is no evidence in an action bro't vs him by a third person claiming the goods. Pe 85. 2 H. Bl. 487. 1 Str 88. ^{and} ~~vid~~ Sheriff. and execution. #

In England Parish registers or sworn copies of them are ev. of birth, marriages and deaths. Pe 86. In 23 Strange 1073. In Penn. town registers or rather ~~copies~~ ^{copies} of them are ev. of births and marriages, and a certificate from a clergyman or magistrate is ev. of marriage. -

Ancient Maps, tho' made without public authority are ev when they have accompanied the possession and agree with the boundaries adjusted in Ancient purchases. Pe ev. 89. Gill 78. 1 Q. Ray 434. Strange 95. Pe cases 18.

The records or proceedings of courts of justice are open to the inspection of all persons interested in them. Pe 92. 1. Wils 297.

2. Strange 1242. Haid 128. In 24.

Copies from the books of public offices are also demandable by all persons as interested, unless public policy requires their contents should be kept secret. P 92. 2 St R 616.

And if an inspection of such books is refused when applied for, by a party to a suit, who has occasion to examine them, the court will by a rule, grant him

inspection as far as relates to the point in dispute, or order the officer refusing to permit an inspection so far as relates to the point in dispute. Pe. 92. 5. 1 Wils. 2440
1 Str 304. 10. 105. 78-1223. 42. 2 L.R. 616.

The books and papers of a corporation are also opened to be inspected by all its members, and in a suit between two individual corporators or between a corporation and one of its members, an inspection may be ordered by a rule of the court. C. 8. L.R. § 90. Pe. 92. In 24. 3 Wils. 39.

But this cannot now be done in act of law, in favour of a stranger, even in a suit between himself and a corporation, though in some few instances it has been done.

C. L.R. § 90. 1. is 687. 3. ibid 303. 579. 1. 4. 8. 211. 3 Wils. 398. 2 Dec 1 621.
a rule to furnish in such a case, would compel a party to furnish ev. vs himself, to which the other party has no title.

A court of equity however, upon a bill for discovery, may in its discretion order an inspection of corporation books in favor of a stranger, it being within the province of that court to compel discoveries. In 24. 5. 8 P.B. 592. 3
This is upon the same principle as that of compelling an individual to make discovery under oath. But in criminal prosecutions vs a corporation or any of its members, no court of justice will or can order an inspection of the books of a corporation "Nemo sese accusare tenetur."
Pe 94. 5. In 35. 2 St 1210. 1. Wils 239. 1. 33 37. This rule does not apply to an information in the nature of "quo warranto" tho' criminal in form, for it is in effect a civil proceeding. Hence if it is prosecuted by a member of a corporation, an inspection of the corporation books may be ordered. Pe 95. 3 P.B. § 74.

2 Dec 1 621.

Chy has nothing to do with Criminal proceed

Private writings

Cause Dig 12.

When a fact is to be proved, or other private instrument, the original if in existence and the power of the party by whom the fact is to be proved must regularly be produced. Pe 96. 7. 10 Co. 92. 3. Gill 43. Post 131. ante 49. ante 8. it being the best evidence. And if that is

by a deed

not done, no evidence can be received of the contents of the instrument. Pe. 96. 7. *see*.

The counterpart of a deed, however, can be read in evidence, () vs the party by whom it was executed and delivered: tho' not vs the other party or a stranger. *See* Deed Page 7. 4 Cruise. 2. 12 P. ch 118. 5 T. R. 465. Salk 287. Pe. 96. n.)

4 East
485

But if the original instrument is destroyed or casually lost, an examined copy, or even parol evidence of its contents may be received. This being the best ex. the case admits of. Pe 97. 3 T. R. 151. 1. Str 526. 70. In evidence 30. 1. Campbell 193. 4. East 585. ante 39. 69. *Reads* 104.

Chit
Bell 206. 10.

If the instrument is in the possession of the adverse party and he has had due ^{previous} notice to produce it, secondary evidence may be given as above, if it be first proved that the original was a genuine instrument. Pe. 97. 107 Phil 12. 1. Atkins. 446. 2. T. R. 201. 2. Ross 39. 237. Bl. 206. 10. 1. Cap. 30. Pe. cases. 165. | *note* the rule is the same in criminal cases. 2 T. R. 201. Leach 272. 1. McN 346. —

So of a letter: After if no notice had been given.

But the fact of a previous written notice, may be proved without a subsequent notice to produce the original.

Pe 168. In 323. 2 Ross 39. Notice to the Attorney of the party is as effectual as notice to the party himself.

Phil 12. 2 T. R. 203. 3 ibid 306.

subject

him, however
to attachmt.

If the original is in the hands of a third person, he should be served with a "sub poena duces tecum" and if after service he delivers it to the adverse party, secondary evidence may be introduced. Pe 97. *id* Aff. 38. 9. Post 151.)

If there is a subscribing witness to the instrument offered in ex. he must regularly be called to prove the execution of it. if alive and in a situation to be ex-

5.
-amined- This being the best evidence of the fact. ante
9. Pe. 9. 97. 8. In 256. 4- Esp. 16- 4 Esp. R 239 5 Do. 16.

This rule, holds as well when the instrument is offered to prove a collateral fact, as when it forms the ground of action or defence. 4 Esp. 239. In 28. But if there are several attesting witnesses, the execution may be proved by either of them 264. N. 169. Pe. Hence it is settled, that even the confession even of the party vs whom the instrument is offered as ev. does not dispense with the necessity of producing the subscribing witness. Pe. 97. 8. 1. Esp. 28 89. Douglass. 216. Esp. Dig. 257. Ch. R. 208. 2. Warr. 55. 2. Johnson 451. 7. G. R. 267. 4. Esp. 239. But it has been ruled otherwise in Conn and New York. In 28- 2 John 451.

The English rule is adhered to in the English Ct, even tho' the original instrument is lost or destroyed if the subscribing witness known. In such cases, therefore, secondary ev. is not admissible, unless the nonproduction of the subscribing witness, is accounted for, as by death, absence Pe. 98. cases 30 app* 39. 4 East 53. Pe. R 30. En Do 98. app* 39.

And in England, the confession by the deff^{nt} in an answer in is inadmissible, unless sufficient reason is shewn for not producing the subscribing witness Pe. 98. 9 R 4. East 53 In 25. 6 Post 85.

But when deff^{nt} has produced a deed before Commissioners of a Bankrupt and admitted execution of it, in his deposition, it was holden sufficient in favor of plaintiff with producing the subscribing witness. Pe. 98. 5. L. R. 366. Altho was in the nature of a Judicial confession.

So where the a party pending the suit confessed and agreed to admit the execution of a deed on trial. Pe. 98. Warr 85. 5 Esp. cases. 16. n. - principle same as in former case.

If there is no subscribing witness, inferior ev. is

sufficient as proof of the handwriting of the party.

Re 98. Com Dig Tail. 4. 1. Lev 25. 5 Eip. 16 n. In 21.

To if a person, whose name is subscribed as a witness denies that he saw the execution, Re. 96. case 146. Dondy 216. Phil 363. 3 Eip 173. 2 Camp 365. 636.

After his denial proof may be made as if the deed did not ^{pur}port to be witnessed. Re. ^{red} not see the execution, sufficient, if the party at the time confesses. So were the instrument was not duly attested, inferior evi. may be admitted, thus a name is subscribed as that of an attesting witness. Thus if it appears, that a fictitious name has been subscribed, as that of a witness, or a party attesting, executing Re 98. 9. cases 23. 5 Eip 16. Phil 363. provable as a deed not attested. And so if the witness is interested ~~and~~ ^{not} at execution and continues at the time of trial (5 Eip 16. 1. ~~W~~ Williams 289. It. 34. Re 99. 157. 8. 185. 5 J R 371. 2 East 183. ex. g. If the attesting witness had at time of attesting given collateral security to obligee or was the wife of one the parties. Phil. 363. Hayard 19. 5 J R 371.)

Pea 147.

So where the person, whose name appears as a witness subscribed without the consent or knowledge of the parties. Phil 363. 3 Camp 232. 4 Saunt 220. Note in this and in the former case, the instrument is as if it did purport to be attested. Re. Re 14. 7.

if parties
handwriting
may be
proved.

So if after inquiry nothing can be heard of the witness so that the party can neither produce him or his handwriting. Phil 364. Hayer 38. 3 Binn. 192.

So if at the time of ^{attestation} execution he was legally infamous Phil 314. In all these cases the instrument is in effect as if it did not import to be attested, and may be proved like any other unattested instrument. Re. 157.

1 Phil 363. E.g. by proving the handwriting of the party or by proving his admission that he executed it. or by the testimony testimony of any person present at the ^{con} execution.

Phil 364. Com D. Rev. 2d. 3. Re. cases 145 10. Res. In. 474.
4 East 53. 5 Ep 316. and proof the party's handwriting
is sufficient ground for presuming the sealing and del.
ivering! Phil 364. Re cases 145. 10 Res. 474.

But if the instrument was duly attested, and the witness
cannot be examined, his handwriting is the best ev. Eg. if
the subscribing witness becomes interested after ^{ex^{or}} by act
of law or party on whom the proof lies. proof the handwriting
of the witness is sufficient. Phil 362. 2 East 185. 1. Milt 289.

Stor 34. Re. 187. 8. 185. 5 T R. 271. 2. In this case, the ins-
trument is not considered as unattested Post 186. Phil 362. Eg
as if he has become as ^{ex^{or}} or Ad^{or} to either party 3. East 7.
Post 1. 17. 36. 1. P. Nov 289. 2. Bern 699. St 34. Phil 362. 2. (P.
T R. 265. 1. Johns. 230. Ep 258. 2. Hk 48. 1. Johns. 280. 3 East 7

So if the subscribing witness is dead or presumed to be so.
12. Mod. 607. Phil 362. Re. 100) 1 Bon. 360.

So when he has become blind. Lord Ray 334. 5 Ep 16. 1 Phil
362) or insane. In. ev. 26. 9. Res. 381. 7 3 Res. In. 381.

So where he has become legally infamous (2 Stor 833. 5 Ep
16. note. Ep D. 258. Phil 362. Eg where he has been convicted
of treason, felony or crimen falsi. as perjury, forgery. &c. But a by
since the attestation of any crime, when its nature impeaches
his integrity as conspiracy. Leach 368 2. W. 18. 5. Mod
75 Coup 3. 1 M. & N. No 206. 257. 463.

So if he is abroad out of the jurisdiction of the court.
whether domiciled or not. 2 East 280. Phil 362. Doug. 13.
Re 100 Ep D 258. 12 Mod 607. Re cases 99. 1 Ep D. 1. See
J. term Reports 266)

So if after diligent search, a known witness cannot
be found, tho not proved to be abroad. 2 Camb 282. 12. where
Douglas 89. 93 12 Mod 607. 2 East 183 Phil 362. 7. T R. he lives-
266. 1. Taunton 365. Re 100. 11. John 64. 2 Cam. 282.

is sufficient. as proof of the handwriting of the party.
Re. 98. Com & East. Phil 4. 1 Geo. 25. 8 Esp. 16. or Sn. 21.

So if a person, whose name subscribed as a witness
denies that he saw the execution. Re 98. cases 146.

vide preceding
pages. *

Doug 216. Phil 363, 3 Esp. 179. 2 Cowper 365. 636.

After his denial, the proof may be made as if the
deed did not import to be witnessed. He need not
see the execution, sufficient if the party at the time
confesses,

In all the above case, when the subscribing ^{witness} is not in
a situation to be examined, proof of his handwriting is
considered the next best ev. Phil 160. 362.

And if there are several attesting witnesses, none of
whom are in a situation to be examined, proof of the
handwriting of either ^{one} is sufficient. Phil 169. 364. and
this has been holden sufficient without proof the
party's handwriting. Re. 99. 100. tho' it has been usual to
prove the latter also. The weight of authority however,
seems to be, that proof the party's handwriting is not
necessary. 7. 2 R. 666. Re 501. note. 2. East 1. 85. 250. 4 John
401. T. Ross and R. 360. Phil 363. 1. Contra 7. 1 R. 266. note
6 Douglass 89. or 93. 2 contra 2 Doug. 187. 2 ibid. 255. Pin
292. 3 Bpward 192 1 Claywood 127.

See 99.

For in these cases, when the witness is not in a situation
to be examined, by reason of any supervenient cause, the
instrument is not (as in prior cases) considered as un-
attested. And proof of the handwriting, in these cases
is ev. of every thing appearing upon the face of the in-
strument as sealing - delivery! Phil. 363. 1. (Camb. 895.)

373

In Con. the practice is, to prove, in the preceding cases,
the handwriting of the party, where the law does not
require ~~the~~ subscribing witnesses: that alone is suff-
tho' it would be admissible ^{provable} to prove the handwriting of the
subscribing witnesses also Pin 278.

Where there are several obligors, and the action is as one only, there being no attesting witness the obligors have been allowed to prove the Ex.^{tor}, Phil 364. note 1 Strange 35. when in any of the foregoing cases, the secondary ev. is to be sufficient the meaning of the proposition is merely that such ev. is suff. to let in instrument as ev. to the jury or in other words ^{to go for} the instrument as evidence.

If there are two subscribing witnesses, of whom only one is not in a condition to be examined, the other must regularly be produced. Pe. 101. 2. In. ev 28. his examination cannot be dispensed with by proof of the former's handwriting -

But if both are in a condition in which they cannot be examined, as if one is dead, E3 the other abroad, infamous, insane &c. proof of the handwriting of one is by the English rule, sufficient. 1 Mc Nally 310. Boss 360. In 28. Proof is sometimes made however of the handwriting of both. 3 East 250.

In all the preceding cases, when there is a subscribing witness who cannot be examined, if the instrument ^{turns} out to have been sealed and delivered, this is strong ev. for the jury to presume, that these and the necessary formalities were complied with. E.g. delivery E3c. Pe 99. In 26. Contra Gills 101. Bull. 254. N.P. & strange series

In proving devices, to the validity of which three subscribing witnesses are necessary, by statute, if any one of them is in a condition to be examined, he should be produced and this cannot be dispensed with by proving the handwriting of any or either or all of them. Pe. 101. 2. 37.

If they are all dead, it is necessary to prove their handwriting & that is. the handwriting of all of them. and

of the testator. Pe. 101. 2. 372. 3. Com. R. 531. Str 1109.
 And in such cases, unless there is strong ^{circumstances} presumption to
 the contrary, a compliance with all the requisites of
 the stat will be presumed. Pe 372. Bull 265 and ib.
 and altho' all the witnesses are living, yet the ev. of one
 will be sufft, if he testifies to all the requisites, unless
 the devise is disputed, (that is, contested by contrary ev.
 I suppose, in which case all the witnesses in a con-
 dition to be examined, must be produced. Pe 372. 1. R
 Wms 741. 1. Bl' R. 365. 4 Burr 2224. Bull 264. Str 881.)
 Note see Bull 246, that in this case, it is the duty of
 the heir at law to call the others, & sed quere, for if
 so the rule itself appears nugatory. vid Pe. 8. 372. Contra

But Ch^y will never decree a devise proved, unless all
 the witnesses capable of being, that is, of testifying, are
 examined, even tho' one is beyond sea. Such probate
 being conclusive upon all parties. Pow D. 718. 1. Wms
 216. 1. ves. 177. see title Dev. 195. Like probate of
 will of personal property in a prerogatives
 court, ante 56. Con cts of probate will declare a
 devise proved upon the ev. of one of the witnesses.
 In 27. Dev. 196. A an appeal lies in all cases to a
 supreme ct.

And tho' any or all of the attesting witnesses deny
 the execution of a Devise, it may be proved by other
 witnesses. 1 Bl' R. 365. Bull 264. 2 Str 1096 4 Burr
 1225.

When the subscribing witnesses to a deed can't be
 had, other secondary ev. than his handwriting may be
 adduced. Eg the confession of a party in an answer
 in Ch^r Str ev. 28. 4 East 52. Ante 87.

When a deed offered in Ev. was executed under a power
 of attorney, the power must also be produced and proved
 like any other deed. 1. Esp. 90. In 28. 4 Ed⁴ 239. Inq^a
 262 Inq^a der 262.

In proving the handwriting, the belief of the witness is ev. 71.
both in civil and criminal cases. Pe 102. 1 Burr. 642 In 29.
But this belief must be founded on a familiar acquaintance with
the handwriting of the party, as having seen him write or
received letters from him in a course of correspondence, having
barely seen signatures purporting ^{to be his} is not sufficient. Pe 102.
4 1 Burr 642. 1 BR 384. Pe app^x 11. 12 In. 29. 4 Esp 273. d.
Bull. 235. b Pea Evi 102. 4.

Having seen the party writing his name pending suit,
for the purpose of showing his mode of signing, is not
sufft to let in such ev. altho' evidence for himself. 1 Esp D.
14. 15 Ch 9. B 207. McN 421. 4. Esp. 233. 9. N. 273. E.

The witness should speak solely from the appearance
of the writing without considering extrinsic circumstances
as his opinion as to the party's signing such a writing. or
the probability of his doing it. Pe 102. 3. Cas. 142 ...

Evidence, that other writings attested by the same witness
were forged by him. (he being dead) is not admissible
to counteract the presumption arising from proof of his
handwriting. Pe. 103. N 125. Would not evidence of his gen^l
character be proper? Peak 103. 125 Post 102. 4 Esp 50. that
it would.

Comparison of hands is regularly not ev. Pe. 104. Cas 20
In. 28. 9. 30. Esp 357. 4. T R 497. 4 Esp. 273. McN. 374. 417.
4 Pe. 358. 1 Bac. 664. Bul. 236.) 1 Burr 644.

By comparison. is meant a comparison by a Jury between
the writing in question and one which is proved or ad-
mitted to be the party's. or a similar comparison by wit-
ness, who is to testify his opinion from the similitude or
dissimilitude of the two. Pe. 104. 4. Esp Pe 273.) the meaning
of the rule, is this, an opinion formed from such com-
parison by a witness, is not ev. and that the Jury have
no right to judge from such a comparison made
by themselves.

The above general rule is now established, and holds in civil and criminal cases. Pe. 104. 4 Esp. 37. 117. 244. 273. 6 Mo. H. 417. Pe. cas. 20. 1. Esp. R. 14. 5. 18. 418. Thin 578. 12. Mod 72. Lord Raymond 40. 2 Esp. 714. 8. Des. 474. tho' it was formerly supposed not to extend to civil cases. Gibb 53. M. H. 394. 1 Esp. 381. Bull 231. Pe. 104. 5. 1 Note but may not a witness skilled in such matters, testify his opinion from similitude of hands &c. This is done in court.

In Con. comparison of hands by the jury has been allowed. In 30. 4. Esp. 273. Root 107. But this is not law now. See Mass. R. 512.

And in Eng^d, where the antiquity of a writing renders personal knowledge of a persons handwriting impossible, a witness who had made himself acquainted with the characters of that person, has been allowed to testify similitude. Pe. 164. 2 Bull 263. In 30. But this was from the necessity of the case. 4 East 282 n. 4

And it seems admissible, to compare the writing in question with other Ancient writings, having the same signature, when the latter have been preserved as authentic documents. 7 East 282. N. A. 14 East 328. Vide Contra cited per Gates Pe. ex. and Cases 20.

And it seems, that a person professionally skilled in detecting forgeries, as the clerk for inspecting Franks. at the Post Office, may testify by his opinion from the appearance of a writing, that it is a feigned hand. Pe. 105. 6. 4 Esp. 497. 4 Esp. 145. Contra 2 Henion Pe. 105. 6. Appx 11. 12.

There are cases in which written instruments may be read without direct proof of their Ecce^t Eq when produced by the adverse party on previous notice for that purpose. Ante 79. Pe. 108. 9. N. 158

43.4. In ev. 34. 5 Esp. 17. 5 TR 366. vide 8. East 548. 2
Cowp. 94. 3 Taunton 62. 17. Johns 158. So holder in one Carr
Case, when the adverse party was not party to the pro-
duced. Contra 8. East 548. 2

A deed of 30 years standing may be read without
proof of execution, provided the possession has followed
the provisions and there is no apparent erasure or al-
teration. Pe. 110. Bull. 255. Gill 100. 1. Esp. 275. Esp. D. 774.
259. In ev. 33. 2 BR 532. 2 TR 466, 5ibia 259.
This is *ex necessitate rei*.

The rule, however, being founded on presumption, does
not hold, where there ^{are} circumstances from which a con-
trary presumption arises. Eg alteration. Erasure, incon-
sistent possession of the subject. Pe. 110. In 33. Bull
255. Gill 101.

So if the deed were of a reversion (of which there
could be no possession) and a subsequent deed of the same
instant had been made to another, who proves his
deed. Pe. 110. Bull 255. In these cases, the ordinary
evidence must be given. The presumption from
antiquity being destroyed by ^{an} opposite presumption.
Gill 101. Pe. 110. In 334. Ancient deeds found among
the deeds and muniments of title, have been admitted

The recital of one deed in another has been considered ev.
of the recited deed. as vs to the party to the reciting
deed. Pe. 111. Palk 286. In 34.) This, however, is now
regarded as secondary ev. and admissible only
when the recited deed is shown to be lost. or when
some other reason is given for not producing it.
Pe. 111. Haia 120. 2 Ld 108. 6 Mod 45.

Formerly if there was any ^{erasure} rature, interlining or
apparent alteration, the Judges determined on the
view of profect of it. whether it was good or not
whether it was the instrument delivered or not.

Gill 104. 10. Co. 92 Deed 55.

But in Modern practice, the question is left to the jury upon the issue of "non est factum".

As to alterations of the Deed by ^{the} party and by Strangers, vide Lit Deed. 54. 5. forgery. Gill 105. 11 Coke. 27. Str 1160. -

Explanation of written instruments. A Deed or other instrument when proved, is conclusive upon the parties thereto. & Hence it cannot be contradicted by parol ev. Pe. 112. 5. Co. 68. 3 Will 275. 1. Bro. Chy 92. Rob. It. fr. 9. 10. 2. P. 1249. 2 Bac. 309. hence Estpell

But a latent ambiguity arising in the construction of the deed, or other instrument may be explained. Pe 112. 1 P. 703. 7. ibid 138. 1. Bruch. 472. In 372 Comt Pe 69. by parol Evidence.

By a latent ambiguity is meant, an uncertainty arising not upon the face of the writing, but from some extrinsic fact, probably by parol. in which case, the uncertainty may be removed by the same kind of Ev. - Pe. 112. In 36.

In such cases, the parol evidence, does not affect the construction of the instrument, it only ascertains the subject-matter person to which it relates. Eg. A Deed to A there being two of that name. Pe. 112. 1. B. P. 60. 5. Coke. 68. 1. Poll 676. In 36. 2. Ves. 216 1. P. Wms 420. 35. 8. Co. 155. 3. Taunton 147. 3. M^o E. Selb. 171. 4. 2. P. Wms 35

So when devisee's name is mistaken. Pe. 117. 6. T. P. 671. 2. P. Wms 141. In. 37. 8. Day 11.

Alter if his name is wholly mistaken, Pe 117. 2 At 240.

But the declarations made by testator long before

75
making the will are not admissible. 6. 5th Ed. 671. 2. 114. 206

So if one having two Manors of Dale, leaves a fine of the "Manor of Dale" circumstances may be proved to shew, what one was intended. Pe. 112. 1. 2d Ed. 676.

When there is a right name and wrong description, a devise may be carried into effect by Parol evi. if there is no other person, to whom the ^{description} applies. It is void from uncertainty if there is.

Same distinction, when the name is wrong and description, right. 2. 37. 1. 2d Ed. Chy. 30. 1. 2d Ed. 266. 2. ibid 442. 5th Ed. 671.

So parol evi is admissible to rebut an Equity, or to oust an equitable presumption or implication arising from the face of the instrument. For in the first case, it is discretionary with the Ct of Equity to enforce an Equity, and in the second, presumptions prevail only, when there is no evi, to rebut them. Eg. when one gives a legacy to his Ex^{or} without disposing of the surplus. Ct of Chy. will permit parol evi, to shew, that the Testator intended that the surplus should go to Ex^{or}. For by law, the Ex^{or} was entitled to it, and the evi. is admitted to rebut a contrary rule of Eqty. founded on a presumption, arising from the legacy. not to oppose the apparent intention according to law, but to support it. Pe. 113. 2. 40. Bull 297. Talb 240. 1. Pow. C. 427. 2. Atkins 68. 220. 2. Ves. 299. But such evi. in support of the equitable presumption, ~~vs~~ the legal is not admitted. ibid.

"Pow Chy
10"
[2/11/12
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For a more full explanation of the doctrine of rebating an Equity, see Pow of Chy. 19. 1. 3rd Ed 384. 1. Bes 240. 3. V. 11th Ed 40 Talb 49. 246. 1. 2d Ed Chy 201. 338. 2. 40. 2. Ves. 299. 370. 3. Atkins 325. 6. Bes 328. 7. ibid 211. Devises 118.

But where the Devisor expressly bequeathed the residue to the Ex^{or} who owed the Testator by bond, parol

evi. was not admitted, to shew that the testator did intend to enlanguish the bond. This would have been vs the apparent intent or legal effect of the will. Pe. 113. Fall 240.

So a fine being levied, without declaring any use, was admitted to vest the use in the Conusor. This rebutting the presumption of a resulting trust to Conusor. Pe. 113. Gill cases 16. Day 26. Locus if a third person had claimed the use and offered the Evi. *ibid*.

So an implead revocation of a will, from the subsequent marriage of the testator and birth of a child, may be rebutted by parol evi. Pe. 114 Day 31. tho' such presumption cannot be established by such evi. 5 Tr. 149. Pe. 114

But a presumption of revocation, arising from a change of testators estate, cannot be rebutted: for here the intention does not govern. Pe. 114. 2 H B. 516 Devises 9. 103.

A patent ambiguity. *TE.* that is, arising out of the terms of the instrument cannot regularly be explained, by parol testimony. For questions arising upon the face of an instrmt are matters of legal construction, to be determined from the instrmt itself. *Bide* La Bacon's reason. Pe ev. 116. Bac. ev. 82. 2 Ves. 624. Str 38. 3 Brochy 311. 2 Atkins 239. 3 ibid 257. 3 Ves. Jr. 148. 4 ibid 680. Eg. a devise to one of the sons of J.P. he having several.

In some exempt cases, however Patent ambiguities have been explained and words not in themselves ambiguous, have received a construction variant from the ordinary import, upon proof, extrinsic proof of ^{the} circumstances of the testator, of the value of the property in question, of the condition of his family, of the state of his property, but not not of his declarations: In the cases all explained in Devises 114 ~~17~~. 17. Pow 2 502. 19. Pe. 116 Str 281.

93. 3. Robb 49. 610. 16. 1. Freeman 479. 2. Equity case. 298
 3. Burr. 1898. Pe. Ch. 7. Salk 234. 2^d Raymond 831.
 1. Broth^g Chy. 472. 6 Co 10. 3 Keb 49.

But parol evi. is not admissible to contradict, enlarge
 or restrain an express agreement in writing, *ex gratia*, written
 agreement in writing, *Ex gratia*, written lease agreement
 for a lease for ten years at 100 £ol. Parol evi. that the
 lessee was to pay a greater or less sum, or that the time
 was 5, or fifteen years, is not admissible. Pe. 117. 2 B R 1249.
 3 Wilson 275. 1. Broth^g Chy. 92. 249. 1. Fomb 188. 6. T R 432.
 1. Pow Chy 429. 3^d Pow 47. 18. Sober 340. See Contract

But when the writing is unsealed and not the evi be
 admissible, but for the statute of frauds. 1. Cowen 249. 18
 Johns 40. 3 Pow 57. & Munk. so I Could.

But collateral matters about which the written agree-
 ment is not conversant, may be proved by parol. Pe. 17.
 8. T R 379. 2 B R 1250. Eg. that the lessor was to repair.
 15 Mass. 80. And parol evi. is always admissible to
 shew, that the instrument in question, is not the act
 of the party, whose act it purports to be. Eg. that a deed
 was not sealed or delivered as the law requires,
 that a deed or devise was falsely read to the grantor.
 or Testator &c. Pe 118. 8. T R 147. Gro 38.

So to prove an instrmt illegal, as for usury &c. Pe. 119
 49. 2. Wils 347. 3. T R. 474. Pow D. 477. For in such cases
 the evi. is not admitted to contradict a valid instrument,
 but to shew, that it is not, what, it imports to be. — to
 set it aside.

So to shew, that an apparent illegality in the instrmt
 was occasioned by a mistake in the scrivener as the
 reservation of illegal interest. 2 Mod 307. Orr. 38. 86

If an ambiguity arises in an ancient instrument, uniform

usage under it, (which is in the nature of a practical construction) may be admitted to explain it. R. 119. 20.

3 Atkins 576. 3 L R 279. 288. 4. ibid 310. 6. ibid 358.

Cow 248. 4 East 327. 2 Taunt 120. 12. East 559. 14. East 348
7. ibid 200. 1. M & Sel 101. 1. Camp 22. 10 John. 302. 6 Taunt
752.

On a covenant for a renewal in a lease, evid. of several former renewals was admitted to shew, that a perpetual renewal was intended Cow. 819. But see *contra* 3 Ves 5n 298. 6. ibid 237. 2 n 448. 2 N B 449.

A receipt not under seal may at Com Law be explained or contradicted by parol evi. as a receipt expressed to be in full. Phil 74. 2 L R 366. or 826. 1. Con R 414. 5 Ves 37. 12. John 531. ibid cases 145. 2 ibid R 378. 3 ibid 319. John 5 ibid 68. 8. 389. 9. ibid 310. 11. Mass 37. for such writing is of no greater solemnity, at Com Law than a parol contract, only *prima facie* evi.

So if a bill of lading which includes a receipt. ex rec^d in good order &c. this may be contradicted by parol evidence. Phil 74. n. 7. Mass. 297. 4 John 23.

So an acknowledgement in a Deed by Trustees of consideration rec^d one of them may shew by parol, that the whole went into the hands of the other. Phil 74. 4 John 23. This is consistent with the deed. 3 L R 371.

But in general, it is said, a written contract not sealed, cannot be contradicted, nor varied, nor, (except in the case of a latent ambiguity) explained by parol ev. at Common law. independently of the statute of frauds, provided, it is complete in itself, and capable of a sensible explanation. 11. Mass 27. 2 B R 1249. 2 B & P 365. Sed quere upon the original

principles of the Ct ante 94. 7. S.R. 357.

93.

Of Parol evidence. who are competent witnesses,
& who not? is a question of Law.

A person is said to be a competent witness, when he may
legally be admitted to testify at all. and Competency is
a question of law to be decided by the Ct.

His credibility, is the credit to which his testimony
is entitled. and this is a question of fact left to the
jury. Pe. 134. n. Burr 117. Burr 417. 1 Barr 417.

In general all persons, not rendered incompetent
by some legal disqualification, are admissible wit-
nesses. 1 Mc N. 95. 6.

It want of
understanding.

No person, can be admitted as a witness, who, is
"non compos mentis" not in the full possession and
exercise of his understanding. Pe. 122. Gill 144. Sn 44.

Hence idiots lunatics, unless in lucid intervals, are
not admissible. Pe. 120. 3. Bull. 293. Gill 144. Sn 46. Ibid.

Persons intoxicated at the time they are offered as
witnesses are rejected. for a temporary derangement
of mind. 16 Johns 143.

Same rule applies to infants of so tender years, as
to be incapable of understanding the obligation of
an oath. Pe. 123. Gill 144. Sn 44. Pr 700. - 1.

An infant of 14. is *prima facie*, as capable as an adult.
so that the "onus probandi" lies upon the party
objecting. to his admission. Pe. 123. Gill 144. 1. Hall
P. C. 163. 1. Mc N. 149. Co Ltr 6. 16.

Under that age, his competency depends upon his
apparent understanding. which is to be discovered
by a previous examination. Pe. 123. Gill 144.

It has been said, that no one under 9. has ever

been admitted to testify and very seldom any one under 10. *Pr* 701. 1. *McN*. 153. *Pe* 11:3 note. } children under this age are of course rejected.

The rule, however, appears to be now, that a child of any age may be examined, if he appears upon a previous examination to be acquainted with the nature and obligation of an oath. *Pe*. 123. *N. Bull* 298. *Gill* 144. *Pr* 45. 6. 1. *McN* 149. 151. 4. 1. *Atkins* 29. *Leach* 114. 346 *Post* 70. 11. *Mad* 228. 1. *Hale* 302.

Thus an infant of 7 years old has been admitted even in criminal cases. *Pr* ex. 45. *Leach* cases. 482.

1 *McNally*
154.

Somewhat infants too young to testify under oath, were allowed to testify without oath. *McN* 150. 291. 1. *Hale*. *P. Cr.* 634. But this practice is now exploded and infants are allowed to give ev. under oath or not at all. *Leach* cases. 114. 340. 164. 1. *McN*. 151. *Atkins* 29.

at C Law A slave is not as such, incompetent. *McN* 156. 4 *Dallas* 145. n.b. and as to slave holding states, are excluded except vs or for one another in a capital case.

A person deaf and dumb, if shown to possess sufficient understanding, may testify by signs, through a sworn interpreter. *Pe*. 123. 4 *Leach* 315. 47. 44. 450. *Pr* 46. *McN*. 156. 7.

Here ignorance may disqualify a person from being a witness, as ignorance of the nature of an oath or of future state. *Pr* 47. 4 *Leach* 482.

The previous examination in this case was on the "voire Dire" question should it not be without oath, as in the case of infants. 55

12 no

who believe
in Christianity
7. *Pe* 17.
C. *Litt* 16.

It was formerly supposed, that an infidel was incompetent, as having no regard for the obligation of an oath. *Pe*. 139. 1. *Halk* 434. But now all who believe in a God, the obligation of an oath, future state are competent. *Pe*. 141. 2. 1. *Atkins* 21. 1. *Wilson* 34. *Wiles* 538. *Leach* 58.

Pe 11. *Ex* 2. 720

348. 482. In 48. Esp @ 726. 1 M.N. 64. 95. 6. 261. 2^a Str
1104.

So that infidels believing those doctrines are admitted to testify, on being sworn according to the ceremonies of their own religion (ibid. still those persons that disbelieve either those doctrines are incompetent.

1 M.N. 38. 1. Atkins 45. And the proper enquiry on this point, is not whether the witness believes in a Saviour, the Gospel or the Bible, but whether he believes in the above doctrines Pe. cases. 11. In. 50
1. M.N. 261.

The question, whether the person offered as a witness believes these doctrines, is usually decided, it seems (not under oath) before he testifies upon the issue Pe. 11. In 50. 1. M.N. 261. but by examination.
259.

But the enquiry has sometimes been made by way of cross examination = Quere this mode proper?

For the objection goes vs his taking an oath. 4 Day. 5. 5. 7. 1 Mc. hally 257.

Our own courts have admitted proof of previous declaration of the witness to shew his disbelief. in then doctrines, and thus exclude him. 4 Day 51.

Quere can such proof be admitted on principle, except to contradict his answers on his own examination and thus to discredit his testimony? If it can, a witness may by false declarations out of Ct and when not under oath, deprive a party of his testimony. Sed see In ex 49. 2 Ves. 46. 3. 4.

Where a witnesses confession of interest, when under oath, in another case, was admitted to destroy his competency.

Quakers who believe it to be unlawful to take an oath, may be admitted by En^d statute 7. and 8. Mm 3^d and 1. Geo. 1^d 3^d Geo. and 22 George 2^d to give ev. in civil cases without oath, upon affirmation. 2 Str 1219. Pe. 183. Still Re
guilty of
Perjury.

Cow 382. But not in criminal proceedings. 5 PA 1
58. Esp 728. Pe. 143. Str 854. 72. 946. and 202. 2 Burr 11
1219.

But a Quakers affirmation in the form of an affidavit may be read to exculpate himself in a criminal proceeding Pe 143. 2 Burr 1117. ante 102.

In Quaker Court, Quakers are by statute enabled to testify upon affirmation in all case criminal as well as civil. 1st Conn 559. So of all persons conscientiously opposed to taking an oath.

Legal Infamy. A person may be incompetent to testify from the infamy of his character.

Rule a person, legally infamous is an incompetent witness in any case. Pe. 124. Gill 139. Str 883. 1148.

By persons legally infamous are meant those who have been convicted of some infamous crime, treason felony, perjury, forgery, or any crime which in its nature impeaches his integrity, as Barraty or Conspiracy Pe 126. 7 Leach C. C. 382. or 476. 308. 2 Mills 18. Cow 3. 5 Mod 75. 1. Mc Nally 206. 37. 463. Sm 52 Salk 690. Str 1148. Gill 139. Com D Test n. 2.

Testimony n. 2

Formerly conviction of an offence which incurred infamous punishment as the Pillory, was considered as rendering the offender infamous, whatever the offence may have been. Pe 124. Sm 52. 2 Hall. P. C. 277. 8. 1. McN 140. 206.

Haley

But it is now determined that the nature of the offence, and not the punishment decides the infamy. Salk 689. 90. Pea 127.

Hence conviction of an infamous offence renders the offender incompetent, tho' the punishment should only be a fine, as Barraty Pe. 127. Gill 140. 1.

& contra, the conviction of a libel tho' followed by the pillory does not destroy ones competency. Pe 127.

When legal infamy is merely a consequence of conviction, the party is restored to competency by a pardon from the Executive Government, as when one is convicted of perjury or any other infamous crime at Com Law. Pe 128. 9. 1. Ves. 349. La Raymond 257. 8. Leach 389. 1. Mc N 213. 17. 7 Term R 463. Salk 689. 2 Hawk 558. 609. Esp 724. Aliter when the incompetency is made by statute a substantial part of the punishment. And it not be more correct to say a part of the judgment or sentence? as on a conviction of perjury under Stat 5 Cl. Chy Pe 127. 1. Mc N 235. Salk 514. 690. 3 Lev 426. Com. D. Test a. 5.

For extrinsic pardon dispenses only with the legal consequences of a judgment: it cannot destroy the judgment, which as regards the legal infamy is executed or removed. In the last case nothing short of a reversal of the judgment on the conviction, or a statute pardon will restore his competency. either of these will restore it. Pe 128. Salk 689. Com. D. Test a. 5. *Testimony a. 5.*

If one is convicted of a chargeable felony and burnt in the hand, the burning restores the competency. for it amounts to a stat pardon. Pe 128. Leach 115.

Ray 380. Rebb 37. 8. Keeling 37. 8.

So now under Stat 19. Geo 3rd c 74. if whipped or fined, but conviction in these cases may go to his credit Com D. Test. a. 5. Doubtful Gould.

But a conviction of an infamous crime without a judgment in pursuance of it, is no disqualification of a witness. Pe 128. 9. 1. Plea. 57. Cow 3. Wood Jns 574. Salk 586. for a (verdict) a judgment without a verdict is no evidence of the fact found by it. in any case. Pe 2483 Pls 161. Pe 49. Com D. Test. a. 5. eva. 6. But proof of the execution of the judgment,

that is, infliction of the punishment, is not necessary for the infamy received by the conviction does not depend upon the punishment. *R. 127. In 52. 5 Mod 75. 2 Nil 18. Com D. Test a. 5. See 127.*

Phil
206. 3.

And it seems now settled in principle after a series of contradictory opinions, that the proof of a witness's legal infamy can be made no other way than by producing the record of his conviction.

8 East 477. 2 Hawk 46. Bull 292 Com D. Test a. 5. 4
4 Day 123. 13 John 82. Mc M 256. Talk 653 12 Mod
584. 11. East 309. 2. Starkie 51. 241. 1. Holt. N. Rep 541.
Doug 593. La Raymand 1088. 15. Bessy 241. 2.

Tho' there have been cases, in which the witness has been called, upon to disclose the fact upon the "Voire Dire" *T. R. 440. R. 129. 138. 1. Mc N. 210. 13. 258. Leach 382. 3 East 452.* But this practice seems entirely opposed to principle. For ~~that~~ ^{as} no one is bound to accuse or disgrace himself - thus on an indictment for Rape, the woman is not obliged ^{to answer} as to any prior connexion with others, nor is a man obliged to answer whether he is the father of an illegitimate child. *APh 206. 3 Cow. 210. 518. 13. East 56. note. Gould so says.*
Can

2^d the party who produces the witness, has a right to insist upon his not being prejudiced in his proof or otherwise than by matter appearing upon record, unless record evi is produced. ante 36.

3^d A witness is not presumed to understand the contents or construction of a record, or the precise nature of a conviction. It must be judged of by the Ct. by inspection.

101.

Whether a witness is obliged, to answer any question, the answer to which would tend to dis

- grace, him, tho' it would not charge him with any
crime, is said not to be fully settled. Pe 29. 138. Co Ltr
Phil 206. 7. 8. 266. Talk 153. St 748. 2 ibid. 670. 153. 5.
6. ibid 259. 13. John 82.) not on principle.

Whether a person would be bound to give ev. which
would subject him to a civil action. vide Phil 208
But Stat 46. George 3^d, & it is declared that he
is. 3 Conn Rep 529. 13. John 82. as is a bound to say y^t &
her and

A person legally infamous is not disabled to make not def
an affidavit, in defence of a charge bro't vs himself. contra
& if he were he might be deprived of the means of defend-
ing himself. Talk 461. In 52. 1. McN. 211. & debt
This point has often been ruled upon motions in ques
for information or attachment. Post 105.

The general character of a witness, ^{not legally infamous} may be proved ^{impeached}
not indeed to exclude him as incompetent, but to
detract from his credit. Pe. 124. 5. The evi
which the law permits thus to impeach his credit
is confined to his general character. Particular facts
cannot be proved for this purpose; for he cannot
be presumed ready to meet specific charges vs
him without notice. Pe 125. Bull 296. Phil 212.
4 Esp 102. 4. St 693.

Evidence of this kind can be given only by those who
acquainted with the witness's general character. Pea 11.
and the Question in Eng. is whether he ought, in 4 Evid
their opinion, to be believed when under oath? or 103. 4.
whether they ought not to believe him under oath? Phil 212.

In Conn the only question allowed to be put, is, what
is the witnesses general character for veracity.
the individuals opinion of the impeaching witness
as to the other's veracity, is never admitted.
in this State.

But tho' genl evi, only can be given to impeach the credit of a witness, & yet the party producing him, may call on the impeaching witness to disclose the ground of their opinion Pe. 125-4 Esp. 103. 4 Phil 212.

These are
attesting
not testifying

If the witness to a will are dead and fraud in proving, it imputed to them, the Devisee may give evi, of their general character for probity, 4 Esp. 50, Sw 144. Phil 212. ante 86. If they were alive and testified, their general character as testifying witnesses may be impeached, as in last page.

See
58.9

Previous declarations made by a witness out of Ct, and which are inconsistent with or discredit his testimony may be proved to discredit his testimony, or evi. Pe. 125. 6. Phil 212. 2 Esp. 691. or a letter written by him, 3 Taines 279. or a deposition signed by him

And after the death of the subscribing witness to a will, his confession on his death bed may be given in evi, to counteract the presumption arising from his attestation. Pe. 129. 12. Burr 1244. 55. Meddally 386. 6. East 188. Sw evi 125. ante 18. Mc K.

Baill
297.

The party producing a witness is never allowed directly to impeach his character, even by general evi. But a party may exhibit testimony contradictory to what his witness has sworn. Hence the impeachment if any, is only consequential. 2 Sparkie 334. Pe. 129. Sw 144. Phil 213. B 297. 2 Cow 556.
Cam

In answer to evi as the ^{character} credit of a witness, the party producing him may attack the character of the impeaching witness. or give evi in favour of the character of his own. Phil 212.

In Conn, he may by way of answer, to such impeachment prove, that his witness has made the same statement on other occasions, as in his testimony. Bull. 294. Gilb 135. 1. Mod 282. Phil 212. 13 n. 87.

The testimony of a witness may be discredited, by proving that he was intoxicated at the time of the transaction testified about. In 144. 2. Say 200) 201.

An accomplice may testify either for or against his fellow. (tho' in the latter case, when the prosecution is civil, his interest will go to his credit. Pe 138. 9. Hard. 163. 1 McH. 183. 198. 203. 4. 373. Tell 17. 8. Str 420. In 76. Bull. 286. Esp. L. 725. 2. Hawk 608. 9.

In testifying as the Def^d in a civil case, is he not interested in the event? as a recovery by plaintiff would bar an action against himself for the same wrong. And doubtless his credit may be affected by the offence or wrong, of which he confesses himself guilty.

And if an accomplice, whom the Plaintiff or prosecutor wishes to call as a witness, is made co-defendant, the Plaintiff (if the case is civil) may with leave of the Ct strike out his name; and in a criminal case, the prosecutor may enter a Nolle Prosequi, as to him and then examine him.

Pe 138. 9. Bull 185, Tid 441. Post 120. 1 Mc Nally 194. 200.

That an accomplice has received a promise for pardon, ^{See 18.} or reward on the condition of his giving ev. goes to his credit and not competency. Pe 139. 1. McH. 140. 200. Tell 18. 2 Hawk. 646. vide Contra 2 Hal P. C. 280. 88. 1. McH. 194. 201. Note if the condition was, that he would testify as defendant, would he be competent? 1. McH. 194. 200. Tell 18. 2. Hale 288. 0. Perhaps it would be difficult to shew, on principle, that the public could in this way be deprived of his testimony. But the fact would greatly impair his credit. Dangerous to confide in such Evidence!

Interest

Another of the most usual grounds of incompetency, in a witness is Interest. Formerly an interest in the question on trial, rendered the witness incompetent, Pe. 144. 5. 1 Phil 35. 6. 7. 8. 1. L. Re. 300. 1 Talk 283. 2 Str 10 43.

Phil 35
37

By an interest in the question is meant, the interest the witness has (or the influence he is under,) from being in the same situation as the party by whom he is offered in relation to the fact to be tried; or in other words from his having or being exposed to the same claim, which may arise out of the facts in question; tho' his right would not be affected by the verdict or judgment, in the case in which he is offered as a witness.

Pe 144. 5. Phil 37. 6. E.g. action vs one underwriter and another upon the same policy offered as witness for him to prove some fact, which would be a defence to both or for both. So an action vs one commoner and a fellow commoner offered on his side.

Separate indictments vs A and B in perjury or swearing to the same fact, and A offered as witness for B.

Action by a master for beating his servant, laid with a "Per quod" and the servant offered as a witness for him. One person injured by a trespass offered as a witness for another injured by the same trespass for the event of the suit, whatever it may be does not affect the witness. 8. Johns 377. Pe. Evi. 166. Str 195. 944. 1054. 3 Wils 13. 1. Rose 472. Contra Strange. 414.

8. Johns
17

5. 1 R 36

2255

But it is now settled, since the case Bent vs Patel. 3. T. R. 336. that this species of interest goes only to the credit of the witness and not his competency. Pe. 144. 6. 1. T. R. 63. 302. 3. ibid 36. 7. ibid 60. 603. 4. Buron 2225. 2. T. R. 496. 4. ibid 20. 589. 1. H. B. 303. Hard 358. Hence in the examples, given above, of an action vs one underwriter, the witness, tho' interested, is not incompetent. 3. T. R. 36. 1. ibid 301. 2. Roll. 685. Phil 37. Bull 283. 5. T. R. 604.

107. and the General Rule, now is, that a witness is not
disqualified on the ground of interest, unless he
is interested in the event of the suit, that is, in a
situation to be immediately benefitted or injured by the
event of it. Pe. 144. Phil. 3. Johns 83. 4. Ibid 302. 5 ibid
256. 1. Day 266. 270. 2 ibid 531. 6. Bin 316. 1. Hard 6. 5 John
Starkie 68. 4. Taunton 18. Ibid ante 256.

Hence a woman whose husband has been convicted
of a capital crime, was admitted as a competent witness
vs others indicted for the same offence, tho' she confessed she hoped
the conviction of the others might procure her husband's
pardon; a pardon not being a necessary consequence
of the conviction of the others. Pe 145. Phil 37. 1. Mc N
176.

So in ^{crim} prosecutions the person injured by the
offence, is regularly a competent witness for the pros-
ecution, tho' he may have a claim vs the accused / no hall
for the civil injury. involved in the crime. Pe. 146. 4 53.
Burr 2225. Phil 86.90. 7. T Ro 76. 1. Cow 9. 151.

4 East 581. 1. Taunton 520. for he has no interest in
the event of the prosecution, as the ^{ver} indictment in it,
cannot be given in Evi. for or against him. The interest
or influence goes to his credit. Note, unless the verdict
in the prosecution can be given in Evi. in his civil suit.

But there^{is} is case. I trust, in which at Common
law, it can be given in Evi. Pe. 45. 6. 140.8. Phil 87.8.
4 East 577. note 581. 1. Cowper 9. 151. 4 Burr 2225;
ante 60.

Thus upon an indictment vs A for a battery vs B
or for stealing his goods, B is competent witness.
this has never been doubted. Pe. 148. Hard 331. Phil
86.7. 1. Sid 211. 2 Bac. 291. 1. Mc N 53. 1. Roll 403. 2
ibid 685.

So upon an indictment for robbery, tho' the wit-
ness is entitled to a restitution of his property on

conviction. Phil 87. 9. Mass. 30. Leach 290. 1. Mc N
50. 61. 116. 144 (for he is entitled to the property if it
is his, whether a conviction ensues or not. — Gould.

shun

is Rule
reached
offence
and with
force.
only.

So in prosecution for a cheat! Phil 87. 1. Ves. 49. 2. ^{Ventris} ~~See~~
431. 1. Salk 286. Contra Salk 283. Str 1043. ^{Rum}

So for perjury at Comm. Law. Str 1042. 1004. Salk
282. Heand 381. but these three last ^{authorities} ~~cases~~ are overruled
4. Burr 2225. Phil. 87. Pe. 104. Evi. 146. 8. note.

And in the case of perjury, it is not material, whether
the witness has or has not satisfied the judgment ob-
tained vs him by the offender. Phil 87. 4. Burr 225-
(500 4 East 577) 4. Gall 412. Contra 1. Esp 97. Pe. 12. Gibb
124.

So in a prosecution for perjury under the statutes
5 Eliz ch. 9 which gives the party aggrieved half
of the forfeiture. For in his action to recover it, the
record of the indictment conviction, upon the In-
dictment (it is supposed) would not be evi. Phil 88.
Contra Gibb 124. 2. Rolle 685. Psall 289. 1. Raymond
1229. Quere would it not be evi. of the fact, that
a conviction had been obtained? How else could
the witness recover his half of the forfeiture?!

And even persons, to whom counties are given, by the
for apprehending and prosecuting offenders, are
competent witness vs them. Phil. 86. 7. 94. Pe. 171.
2. 152. 1. Wills 422. Leach 290. 1. Mc N 50. 61. 116.
144. 179. here indeed is a direct interest in the
event: but if their evi was not admitted, the very
object of that statute, would be defeated.
That object being to induce those having knowledge
to prosecute, Pe. 171. 2. 2. Wills 422. 3. East 405.
4. ~~Psall~~ 180. See d Quere as to the propriety of this.
40

91.

109 So on an indictment for forging ^{tearing} a note the prom-
issee is competent. Pe. 147. Str 595.7. So upon a
prosecution for usury the borrower is competent to
prove the whole case, whether he has repaid the loan
or not. Pe 147. 8.4 Burr 2251. 7. F.R. 60. 2. ^{old} 496.
Caines 168. 5. Mass 53 Phil-90 Contra 1220.

39-

Same rule, tho' the note has been registered. 5 Mass 58.
Phil 96. 39. 34. note, a 40. it. a. 7. F.R. 601.

But a prosecu^{tor} on a penal Statute, who is entitled to
part of the penalty, is incompetent to testify in support of
the prosecution, Pe 152. n. Str 315. and cases cited 1. Esp. 9.2
Contra Gilb 132. 3 Mod 114. Pe case 218. he is himself
plaintiff and cannot testify in his own cause.

But in the single case of a prosecution for forgery,
it has always been holden, that the party by whom the
instrument to have been made, is incompetent, if the
instrument ^{purports} supposing it genuine, would subject him
to a suit, or deprive him of a right or claim. 2 East
P.C. 995. 2. N.P. 87. Pe. 147. 8. 16 & 8. 9. Phil 88. 90. Hara
331. 3 Salk 172. Str 728. Leach 10. 29. 255.

Rule the same it seems, even if the witness in whose
name the obligation is forged, has before paid it.
Pe 148.

Quere if paid in pursuance of Judgment recovered
what possible interest could there be in the question?

This incompetency extends to every fact which might
conduce to prove the forgery. and is ^{not} confined to the
mere handwriting Phil 87. 8. Pe. 168. 2. N.P. 87. 90. 92. East
P.C. 996.

Locus of a collateral fact not conducing to prove
the offence: as that ^{the} witness offered, is the person
named in the forged ~~ass~~ or writing Phil 89. Leach
487. 2 East P.C. 997. McN 143 Quere upon

what principle is this rule founded upon the effect of forfeiture? 2 P. C. East 994.

110.

This it is said, would go only to the credit *See* Quere) besides the instrument may be forged in favour of a stranger. Is ⁱⁿ the practice of impeaching the forged instrument? this would ^{not} destroy it. The rule seems to be an anomaly supported by the strength of precedent. Phil 90. N. 4 Johns 296. 303, 2.

But on the other hand, forgery is not felony by the Com Law, nor in all cases by the English statutes.

The rule does not hold, however, when the party whose name is forged, would not be personally interested or affected by the forged instrument sup-
-posing it genuine. Eg cashier's name forged to a Bank note, he is ~~competent~~ competent witness

57 Deach 57. 350. 1 McWally 120. Pe 169. Phil 89. Bull 289. 2. East P. C. 1000. Post 138.

So where a Banker has paid a forged draft but struck the money out of his account, thus destroying his claim for it, he was holden compe-
-tent

111.

So where one whose name has been forged to a receipt, had recovered from the prisoner, the money it purported to be given for. Pe 169. Bull 289.

But where the person, in whose name *See* he would be at all affected by the instrument if genuine, he is said to be incompetent, and the rule has been holden to extend to all other persons, interested in the question. Thus on an indictment for forging a will, the executor named in a subsequent will, was holden not competent to prove the other forged. Pe. 169. Deach 29. Rule holden to be same as to legatee, Phil 90. Hawk 331. 3 Salp 172. *See* Quere as to these cases and see Phil 90. N. 4 4 Burr. 2254. where *See*

28.
Mansfield disapproves of them. I should of course.

But the person, whose name has been forged to an obligation, of any kind, may be rendered competent by a release from the party in whose favour the instrument purports to bind.

Pe 169. N. Leach 184. Eg. from the holder of a forged bill. Obliger in a false bond. Sc. Phil 98.

In Conn the General rule excluding the party whose name is forged, has been lately rejected by the Supreme Ct.

So in Mass. Penn. N. York Phil 91. N. 1. Mass Reports 7. 3. ibid 82. 1. Dall 100. 110 2. ibid 239. 2. A R 96. N. 4 Johns 296. 202.3.

But a person interested in the event of a suit of which he is offered as a witness, is regularly incompetent. Pe. 144. 6. 164. 170. 2. Phil 43. 9. 50. 3 T R 36. 7. ibid 60. 603. 2. ibid 496. 4 Burr 2251. 5. Exceptions ante 108. Post 130.

By an interest in the event, is meant, an immediate and certain benefit, or disadvantage to accrue to the witness from the event or result of the suit.

3 In other words, a witness is interested in the event of the suit, only where he will, on the other hand, gain some certain immediate right or certain exemption from loss, or liability by determination in favour of the party, by whom he is offered. (on the other hand, incur some certain immediate loss or liability to loss, in consequence of a determination in favour of the opposite party. Pe 144. Gilt 106. 7. 4 T R 20. 3. ibid 32. 2 Johns cases 236. 4 Johns Rep 302. 5. ibid 257. 16. ibid 89.

And in general, tho' not universally, the question, whether the witness offered, is interested in the event, or not, whether the record of his^{the} cause, in which he offered, can afterwards be given in Evi, for or vs him, in any suit in which he may be party. Post 124. Phil 43. 4. 9. 50. 3 T R 32.

3.6.308. 7 ibid 62. 4 East 58. 4. Johns 230. 5 ibid 144. 3
Esp cases. 486. 4 East 572. 1. Day, 269.

Note This has in some instances been regarded the only
criterion of interest in the event. Phil 49. 50. 3 T R 32. 5
ibid 7 ibid 62. 2 Johns cases 256. *Contra* Phil 50. 4
T R 19. 5 ibid 667. 2 East 561. n

If then a verdict or judgment for the party who
offers him, could thus be given in evi, in the wit-
nesses ⁱⁿ favour, or a verdict for the other party ^{as}
him, he is of course & universally interested in the
event & regularly incompetent. Ibid supra.

Note would it not be more correct to say, if in
recovery by the party &c, the record be given in
Evi.

But if the verdict or judgment cannot be thus
Evi for or against the witness, he is generally com-
petent, tho' not universally so.

For there may be ^{cases by} what is considered an interest in the
event, where the record cannot thus be given in Evi,
tho' cases of this kind are rare, being only exceptions
to the general criterion. Phil 50. 2. 4 T R 19. 5 Do
667. 2. East 561. as to these case see Post 117. 124.

Under the first branch of the distinction.

In a suit by A claiming right of common by custom.
B claiming ~~the same~~ under the same custom, is
not competent to testify for the Plaintiff, as B
might afterwards use the verdict in support of
his own claim. Phil 44. 5. n. T R. 302. 2. Do 32.
Bull 283. La Raymond 731. Ante 55. 2. John
170.

Focus if the Question related to a private
prescriptive right of common as a right be-
longing to the estate of A.

In this case one claiming a similar right as belonging to the estate of D is competent, for this is not a public right - verdict is not evi for the Mit-ness. Phil 445. Bull 283. 1. Fel 449. 2. John 179.

114

So a person liable for the costs of a suit on either side is incompetent to testify on that side, as the verdict, record will be evi vs him.

Action by infant Plaintiff, his Guardian or Tutor. Any is not a competent witness. Phil 46. Str 548. 102. 6. Gill 107. Peak 156. 2. Bacon 680 1. Eg Cases 72. 1. T R 491. 1. Wilson 130. 2. P M 298. Hard 261. Parent and Child 56. 2. Conn R 269. Contra 7. T R 456. 2. East 458. Overuled 148 East 565. 3 Day 101. 1. Binn 444. 5 Esp 174 4 T R 464.

So if any one has agreed to indemnify Plaintiff vs the costs. Phil 46. N Pea 165. 6. Str 575. 4 John 575 and for same reason - So if any one ^{who} has given security in behalf of Plaintiff for the costs as Comissor in Bond for prosecution. Str 575

So of any one who is to receive the avails of recovery or any part of them. Phil 49. Str 129.

For the same reason. Defendant's bail cannot testify for him as they become immediately responsible for the satisfaction of what is recovered vs him and the record is evidence vs them. Phil 46. 1. T R 154. 8. John 407. But one bail may be substituted.

Secus of a surety in an administration bond in an action vs administrator or Executor

So in an action vs a sheriff for breach of or neglect of duty by his deputy, the latter is incompetent for the Sheriff without a release.

La Raymond 1411. Phil 46. Str 650. 3 Coke 5523. Peak 165. — —

It can make no difference I trust, whether the under Sheriff has given the Sheriff security or not, for he would be liable even in either case. Vide Sheriff 34.

So if a servant in an action bro't vs. his master for his (the servant's) misconduct. Phil 46. 4 T R 339. 6. Str 650. Pea cases 53. 84. 1. Esp & 339.

The record would be *pro*, vs, as to the amount of damages.

Indeed a recovery ~~vs~~ the master would constitute his cause of action vs the servant. So in the last case 1. Holt. N.P. 134. 1 Ann 25. 1 Phil 46

Secus if released by master Pe 165. 6. Str 1083. Pea cases 53. 84. 1. Esp 339. 1 Phil

115

So in an action on a policy of insurance for a loss by the Baratry of the master, he is not admissible for the underwriters, unless released by them - for if they are subjected, he is liable over to them, and the record would be *pro* vs him as to damages. Pe. 166 or 106. 10. 1. Esp 339. Phil 47. N. a. Test. 131.

So in an action upon a policy on goods shipped upon freight, the owner of the Ship, is not admissible to prove her seaworthy, unless released by the Plaintiff. Pea 166. Cases 48. for if not seaworthy, he would be discharged and the owner of the ship become liable.

Note would the record in case of a verdict for defendant be *pro* vs the witness, for the purpose of proving as to damages the costs of the first suit? I conclude it would (

So in a suit of indorsee vs the acceptor of a bill of exchange, accepted for the accommodation of the drawer, the latter is not a competent witness

for defendant to prove the transfer usurious. Phil 46.

7. 4 Taunton 464. 1. Cow 408. 1. H.B. 306. 1. Str 575.

For he wd be liable ^{even} over to the defendant, (if Plaintiff should recover) for all damages, as well as for the amount of the bill Post 128.

Suppose it had not been for the drawer's accommodation, wd he not been equally incompetent? as his funds in the defendant's hands wd be liable to be applied to the debt.

So on the other hand, if a witness for Plff wd by subjecting the Plff, exonerate himself of any liability, he is incompetent. Phil 47. N.A. Pea cases 84. 4. Day 458. 2. Nuffc 444. 4. ibid 658.

Case before of Plff's, surety for costs, ^{off his} _{infants} Guardian. Pea 171. Str 506. 1026. Hard 202.

116 So a grantor, who has conveyed land with a covenant of ~~seisin~~ of warranty, is inadmissible to prove the grantees title in ejectment. Pea 47. N.A. 3 Day 433. 2. John 394. 6. Johns 523 See covenant broken. 5. Day 373. Pea 170. 2. Rolle 685. 3. Johns 82. for if the Grantor is evicted under elder title, the Grantor is bound to indemnify him.

Note if the deed contained only a covenant of seisin, how wd he be interested in the event, unless he had been vouched in? He wd be liable, or not independantly of the event of the suit, on the covenant. if the covenantor were liable for the eviction in the first action, his interest wd be in the event.

So if the vender of a chattel, where the vendee's title is in question, there being an implied warranty of title. Phil 47. N. 6. John 5. 1. 4. Ely 164. or 464. This seems the same case in principle as the above of a covenant of seisin.

But a Grantor, Lessor, Vendor without covenant of title, of or warranty express or implied, is admissible in support of the title. Phil 47. N. Pea 170. Str 425. 445.
Not interested in the event. 2 Bin 95.

So if he has warranted merely to those claiming under himself, he is competent as to a party, not claiming under him. Phil 47. N. 2. Mass 441. 2. Bin 95. 108. 500. 6 Bin 500.

So the inhabitants of a town or Parish liable to be rated for the poor, if not actually rated are competent witnesses for the town &c in question of settlement, their interest being contingent. Phil 47. 4 T. B. 17. 6. T. R. 157. 2. East 561. 15. East 471. '12 John 285.

They are admissible in Conn tho' actually rated, from supposed necessity Post 118.

So in support of a Qui, tam action for a penalty which if recovered will go to the support of the poor, of the town. Phil 48. note 12 John 285.

117.

A third person is not competent in ejectment to testify, that he himself and not the deft is in possession. He has an immediate interest in defeating the action, for if it should prevail, he wd be turned out of possession upon the execution. Phil 48. a. b. 52. 2. John Cases 275. 12. Jo 246. Post 124.

This is an example of interest in the event, tho' the record wd not be evi for or vs the witness in another suit, ante 113. But the execution wd act directly upon his possession.

Still less as a General Rule, can a party testify for himself or his coparty, by reason of his immediate and necessary interest, Pea 149. Phil 57. Gille 116. 1. Bern 230. 1. P. W. 596. 1 Day 106. 10. John 128. 4

Day 388, See exceptions Page 128.9.

59

So tho' he is merely a trustee, having no beneficial interest in the subject, for he is interested in the event, being liable for the costs. This liability is certain and his ultimate indemnity contingent. Pea 141. 3 East 7. Pea cases 153. 7. T R 668. 1 Phillips 57. 2. Day 484.

So of an Executor, whether Plaintiff or Defendant, tho' when Plaintiff he is not liable (in Eng.) for the costs. Phil 57 n.c. 1. Bin 444. 6. Bin 816. 1. P W. 2. 89. 2. Ves 42. 2. Bern 699. Str 34. 2. East 183. 20 Co.

Is the reason, that his disbursements may not be allowed, or is it a maxim that the presumption of interest shall not be rebutted? It seems the latter, for his interest in the former case is contingent. Ante 82 Post 136.

But an administrator, "durante minoritate" is, after his authority ceases, a competent witness for the exec^t, for then he has no interest. Phil 57 n.c.

18. And the members of a corporation having no individual interest in the suit, are admissible to testify for the corporation as the members of a charitable corporation, who had no beneficial interest in the funds, and are not personally liable for the costs. Pe. 149. 50. Phil 57. 98. Pea Cases 153. 9. John 220. 8 So 462. 7. M R. 398. 3 Meri; 401.

Secus when the corporators are personally interested in the subject, as in the right of common. exemption from tolls, Stock in a bank. 1. Bern 351. Pea 149. Hol 92. Skin 174. 5. T R 174.

And the smallness of interest in point of amount, appears to make no difference. Bull 290. Phil 523. 59. 5. T R 174. 11. John 57. Pea 161. n. 1. Bern 351. Pea 149
Denby

17.
Com. D.
Franchise 225. Phil 98. 1 P.W. 595. Salk 432.
H. 31.

Secus if the judgment of disfranchisement is irregular, as it may be set aside. 11 Mod. 225. Phil 98. Pea 164.

So by resignation of his corporate franchise. Phil 98. Sal 432. Com D Franchise note H. 30. Post 138.

In Conn Members of public located Corporations (as towns, Eccle^s societies) are competent in all cases when such Corporations are parties. This is partly from the usual minuteness of individual interest, and partly from supposed necessity. Phil 58. N. Pr. 57. Ante 31.

Generally a def cannot testify for his Co Def, for his evi wd go to prove at least that they were not jointly liable as charged. Ante 117.

But if in an action founded in "Tort", no evi whatever is given vs one of the Defs, he is entitled to be upon the close of the Plaintiff's evi, discharged and may then testify for the other. Battery 20. 1 Sid. 237. Phil 61. Gill 117. Bul 285. 1. East 312. 2. Hawk c. c. 246. 998. 3. P.W. 288. 1. Root 134. Pea 152. 1. McN 204.

Said to be discretionary with the Judge, whether he will direct an acquittal in the above case. Phil evi 61. n. A. 1. Bull. N. 275. Not matter of right.

But if there is any evi vs him, the whole case must go together to the jury. Phil 61. Gill 117. Bull 285. 3 Esp 25. 14. John 219. 15. John 223.

So in trespass vs A charging the wrong to have been committed by himself and B. If it appears, that

that D. was concerned in the trespass, and that process had been issued vs him, and an attempt had been made to arrest and the process lost, he is not admissible for the def. Pe 153 Phil 61. Bul 286. Hard 264. 123, Contra 10. John. 21. Phil 62. N. Quere upon what principle? not surely upon that of interest in the event, and he is not actually party to the suit.

20 Secus if none of these facts appear. Phil 61. Style 401. 1. app 452. 6. Binney 316.

If witness for Plaintiff is by mistake made Def. the Ct will on motion suffer his name to be struck out, and he may then be examined for the Pltff Phil 63. 1. Sid 444. 441 Bull 285.

In the case of an information, the Attorney Gen, may enter a *Noli Prosequi* as to one of them and then examine him vs the others. Ph 63. 1 Sid. Hard 163. Ante 103. Battery or Buller 26.

On an indictment vs several, one having submitted and paid his fine, is competent for the others, the case as to him being at an end. Phil 62. Str 633.

But merely suffering judgment by default, does not restore his competency, neither for or against the others, for he is a party to the record, and the case even as to him, is not ended. Quoad the damages he is still on trial. Phil 62. 5. Esp 355 Bull 285. 2 Camb 333 n. 10 John 95.

2
So where one of the Defs on a joint contract has obtained his discharge under a bankrupt law, for he is a party to the record. Phil 62. N. 3 Esp 25.

Besides if the other def should pay the whole sum recovered, he cd compel the bankrupt to contribute, unless prohibited by some positive provision of the

statute of Bankruptcy.

So in an action on a joint contract as two, if one suffers judgment by default, he is not admissible for the other for if the action fails as to one, it fails as to both. Phil 62.

Nor for the Plaintiff, for if the action prevails the party defaulted will be entitled to a contribution from his co Def^t Phil 62. 4 Taunton 752.

But is not the balance of interest in that case, clearly vs the Pltff^s? If so, why may he not testify for the Pltff^s?

121.

It has been holden, that one of two defs, in trover having suffered a default & tho inadmissible for the Plaintiff, 2. Camb. 333. N. is still admissible for the other Def^t. For he is ~~not~~ subjected at all events, and is not liable, it is said, for the costs of the issue. Phil 62. 3 Esp. 553. Pea 152. 3. Sed Quere and see, 3 Esp. 25. and 2. Camb 333. N. Contra 6. Bin 319.

For the Jury may assess joint damages vs all the Def^s and See Day 33.

^{min}Note is not the rule as first laid down a departure from principle!!

Wd not the Party Def be liable for the costs of the issue? If not, still there can be but one apportionment of damages and the Ovi may go to mitigate them. Suppose he were called to prove property in the other def, that might defeat any recovery.

If one of two Defs consents to a verdict, in ejectment, vs himself, for so much as he is in possession of, Simple, he is a competent witness for the other, Phil 62. 3. Bull 255. For a finding in favour of the other cannot benefit him. The damages recoverable being nominal.

But a person liable with the Def or liable in
his stead } tho' not himself a party } is an incompetent
witness to defeat the suit. Pea 115. 70 103

Tho' he may testify in support of it. Semble. *Osra*
30. Phil 364. N. Amle 83.

Thus a partner of the Def is not admissible to
prove, that he is solely liable, and that the Def
acted as his agent. For the witness, who is by the
supposition himself liable, wd be liable for, at least
half of the costs recovered by the Plff. Pea 55. 70
cases 174. & Burr 2127. and 'in the record to indemnify
the Def for the whole;

But a release from the Def wd restore
his competency. Pea 155. 17. 1 Esp & 103.
177. 2.

In Equity, one of several Defs, having no interest
may be examined on either side. Phil 63. 3 Atk 401.
Amb 393. 2. Esp Cases. 214.

122
A Bankrupt is not competent in an action by his
assignees, to prove property in himself, or a debt
due to himself, as increase of his property wd augment
his own allowance. Pea 167. Phil 51. 9. 8. Bull 113. Post
138.

So of his Creditor, for by increasing the Bank-
rupts divisible fund, the Creditors dividend is
increased, Pea 167. Phil 51. Str 507. & Johns. 427.
& Do 255. 2 Dal. 20. 1 Mass 237. 2. Doug. 466. Str 650.

Indeed the suit is for the Benefit of the Cred,
itors.

And the Petitioning Creditor, is not competent
to prove the commission regularly sued out, to
support, it, as he is obliged by the bond, to establish
the bond Bankruptcy. Phil 52. Note A. 2. Cow
411. 4 Mass 237.

But a creditor who has not proved his debt under the Commission, is competent to support it, tho' not so to increase the fund. Phil 52. Cow 301. 2 BR 1273.

^{non}Secus it seems, of other creditors, as they being parties to the proceedings, are interested to support the commission. Pea 167. (3.) Cases 19. But their competency may be restored by a release to the Assignees.

123

The Bankrupt is not competent himself to prove any fact necessary to establish the Commission, for he is interested in supporting it as a means of obtaining a discharge from his debts. Phil 168. 51. Str 829. 2. H Bl 239. 7. 5 Esp. 22.

To tho' he has obtained his certificate and released his surplus and allowance, for if the Commission is not supported, the proceedings under it, are void, and he will remain liable for his debts. But in this case he is competent to increase ^{his} fund, for he has no interest in it. Pe 168. (5) Cow 70. 1. Bro Ch. 269.

But he is competent to explain any Equivocal fact, proved on the part of Assignees by other witnesses, and thus to shew, that it cannot be an act of Bankruptcy. Pea 168. (4) 2. Esp 287.

So to diminish his estate, as to disprove a debt claimed by his assignees, as due to him, for his own interest. Pea 168. 6. Cow 70.

124

In general (as stated *supra*) the Records being admissible either for or as a witness in a future suit, is the Criterion of interest in the Event. Phil 48. 9. 3 Y R 32. 7 Y R 62. 2 Johns Cases 236. 5 Johns R 237. 4 Do 302.

But it is not universally so, and there are in which a witness is deemed thus interested, tho' the record wd not be evi for or vs him, But such cases few.

Thus in trespass vs a Sherff. by A for taking his goods in an Execution vs B. B is not competent to prove the property of the Goods in himself, for tho' the verdict wd not be evi for or vs him in Assumpsit, relating to the title, yet his execution debt wd be discharged, if the Sherff prevailed. 1 Phil 47. N. 52. 2. 1st B 331. Hence an immediate interest in the event. by a in 23

So in ejectment between And B. C is not competent to prove himself the tenant in Possession, for, tho' the verdict wd not be evi for or vs him, yet if a recovery were had, he would be turned out in an Execⁿ vs B. Phil 48 N. 52. 5 Taunton 183. 1. John Cases 275. 12. John 246.

So that, tho' the record wd not be evi, the execution wd be enforced vs him.

A Devisee is not competent to prove Testators sanity, in Ejectment by another Devisee in the same will. 1 Phil 51.

Quere why not? Independantly of the objection arising out of the St of Frauds & Phil 374. 77. La Ruy-
mond 505. Conn R 94. Str 1253. 1. Burr 414.

At any rate this is not an example (as supposed by Phil) of an interest in the event.

For other cases of interest in the event, where the record wd not be evi (ut Supra) See Phil 503.

126 When the witness has an interest, which is balanced

so that he stands in point of interest indifferent,
he is competent to testify for either party. Phil 53.
Pea 154. Gibb 129. 4. Mod & 476.

Thus an indictment vs a county for not repairing
a bridge, the inhabitants of a county are competent
on either side, as to the necessity of repairs,
They being interested as well to have sufficient bridges
as to avoid the expence of repairs. Id. 1 Vent 351.
6 Mod 307. 4 Mann. Selw 676.

So the acceptor of a bill is competent in an action
vs the drawer, to prove no effects in his hands
and thus dispense with notice. Pea 154. 1 Esp 33
For he is alternately liable in either event, if he has
effects.

So the endorser of a Note having received money
from the Maker to take it up. is competent in a suit
by the endorsee vs the Maker to prove the Note
satisfied.

For he wd be liable in one event to the Plaintiff
(the Indorsee) in the other to the Defd. Phil 55. 2 East
458. 4 Taunton 464.

And the comparative difficulty of the Witness's enfor-
-cing a remedy vs one or the other party (where he had
a claim accruing in either event) seems not to effect
his competency. Phil 556. 3 T R 579. 2. Day 399.

127 In assumpsit for ~~the~~ money paid to the use of
ship owners, the Captain is competent to prove he
received the money from the Plaintiffs for the
use of the Defd. His liability being no greater in
one event than the other. Phil 53. 162 J. J
R 481. n.c. 1. Camb 407. 8. Pea 165.

For if he has received the money and not paid it over, he must be liable to one party or the other, in any event, and if he has paid it over, he is not liable to either. *Infra Stark 27.*

So in *Cov for rent*, when both parties claim under *I.P.* he is competent to prove to whom he made the first lease *Phil 54 3 I.R. 307. 2. Roll 658. Gibb 129.*

So in action by the Payee vs the acceptor of a bill drawn by one of two partners in the name of the firm, either party is competent to prove that the other one had no right to draw the Bill. *Phil 54. 13. East 175.*

For the partner testifying will be as much exposed to the claim of the Payee in one event as to the claim by the acceptor in the other *4 Mass 376.*

So in *Assumpsit* between A and B. *I.P.* who had received from the Plaintiff money due to the Pltff was held ~~incompetent~~ ^{competent} to prove he received it as Agent from for the Pltff. *Phil 554. 5. 7 I.R. 480. Pea 165. Supra.*

28
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Secus if the witness wd be liable to a greater extent in one event than the other.

B.g. in Indorse.

Ex. In *ass't* vs the acceptor of a Bill of exchange for the accomodation of the drawer, ^{the drawer is liable to the acceptor} For the ^{the drawer is liable to the acceptor} liable in either event for the debt, he is also bound fully to indemnify the acceptor and of course liable to him for all damages *Phil 55. Ante 115.*

There are certain exempt cases in which a party to a suit is allowed to testify from a supposed necessity *Pea. 150. Phil 57.*

Plaint. of
Robe and Bry

Thus on the St of Winton (13. Ed 1.) the Plff
(the party robbed) is competent in his action vs
the Hundred to prove the robbery and the amount
lost on default of other proof. Ibid 2 Roll 680.
6 Bull 197. 1 Phil 57. Pea Evi 150.1.

129
vii

Secus as to other facts, which in common
presumption are provable by other witnesses, or
rather evi, as the place where, is within the hund-
red sued. Pea 150. 1. Phil 58. Hard 83. or he deliv-
ered money to his servant who was robbed.
Pea 150. n. Sed Quere and See Pea 151. n. Bull 197.

And in action for malicious prosecution, the
evr given by Def in the original prosecution, may
be proved by others in his defence. Simple. Pea
151. n. Phil 58.9. Gilmoa 216. Bull 14.

This rule is supposed for merely the protection
of prosecutors. Ante 20. and vide action for Malici-
ous prosecution. There appear to be generally cases
of this description at C^t Law Pea 151. N

But one or both parties to a suit are allowed by
the Statute Law to testify for themselves.

Thus by St in Conn. both parties are allowed
to testify in Book Debt, account and in actions
by receivers of counterfeit money or Bills.

So the Plff in cases of secret assault. ~~Battering~~
Bastardy and Prosecution for theft.

And So the Def is in Scire Facias on a judg-
ment by foreign attachment.

On Prosecutions upon the St relating to trespasses
in the night season In 81. St Conn. 99. 101. 194
546. 666 2 Day 116.

Upon a similar principle of necessity and for the sake of trade and Com^{mon} usage of business agents or servants becoming interested in the ordinary or regular course of their employment, are competent witnesses for their Principals or Masters (tho interested in the Event Phil 94. 5. Pea 157. 164. 7. 71.

Ex. A Factor may prove a sale of Goods for his principal, to charge the vendee, tho' entitled to commission on the avails 1 Phil 94. 5. Wil 40. 1. Atkins 248. 2. H B 590. Bull 289. 1 John cases 408. 2. Do 60. 2 John Reports 189. 1. Pe 165.

And in general any one who contracts for another is an agent in within the Rule, under a proper authority. Phil 94. 2 H B. 591.

So of a Steward of a Manor when interested to support a claim for the Ld. Phil 92. 2 H B 90 Hard 360.

So an agent is competent to prove in favor of his principal, a payment of money, delivery of goods, Tho' his evi goes to discharge his own liability to the Principal. Pea 151. 2. 164. 5. Cases 129. Bull nisi prius 289. Phil 94. 11. Mod. 262. 4 LR 589. 90. 2. Esp 509. 3 Esp 48. Gal 289 Str 647.

So if an agent has overpaid money or paid by mistake, he is competent to prove it in a suit by the Master to recover it back. Phil 95. Str 647. 3. Camb 1144; Pea 164. 2 Johns cases 270.

Secus ^{as to} the acts of a servant not done in the ordinary and regular course of his employment, and claimed to be violations of trust or duty. These not within the reason of the Rule Phil 95. 6. Bul 289.

Ex, in an action to recover back money paid for illegal purposes. or squandered by Plffs servant - servant not Competent compelled to support the action without a release by the master - for the act is not in the regular course of his employment, and if no recovery had, he is liable to the master Phil 95.6. Pea 164. Note. Coups 189. 189.

So in an action by a master for an injury done by the negligence of his servant, the latter is not a competent witness for his master, for he is liable to indemnify his master, if Plff prevails: The reason of the General Rule does not apply in this case. Pea 165.6. N. Str 6 Pea Civ 166. 56. 2d Raymond 144. 4 TB 589. 1. Esp 389. 6 ibid 73. 1. Esp 339. 6. ibid 73. 1. Cow 256. Competency restored by a release. Pea 166. Str 1083. Pe. cases 53. Post 138. 584.

So in an action for sinking Plffs goods on shipboard, the Master is not a competent witness for Plaintiff without a release from Plff. - for he is interested in the event, and his evi wd not be to prove an act of his own in the ordinary course of his employment, Pea 166. Cases 53. 84.

So in an action for policy of insurance, for barometry of the Master he is not admissible for Defa, unless released by him. Pea 166. 1. Esp Cases. 339. ante 115.

An agent when competent to testify, is so to prove his own authority. 1 Phil 96. 1. a 132. 2. Dale 300. But he cannot prove the contents of a written authority, without producing it. Phil 90. 2. Dale 245. 1. Esp 406. P. 1. 1. Mass 483. ante 8. 79.

Nor can one who has purchased goods in his own name, testify for Vendor, that he purchased them, as Agent for Def. for being personally bound by the terms of the contract, he must, say if Def^t is not subjected. Note the analogy of the case to a dormant partner.

Phil 35 N. 3. Cowp. 317.

It was once holden, that if a witness supposed himself under an honorary obligation, tho' not a legal one, to indemnify a party, he was incompetent to testify for that party. Pea 157. Str 129. Phil 41. 2. 1. Mc N 140. Ex 771. But this rule has since been denied and seems not to be law.

Phil 141. 2. 9. John 219. 1. Camb 145. But it may go to his credit. Fed vide 5 Mass. & 515. 8. John 428. 1. Dall 62. 2. ibia 50. 1. Count 147. 1. Roll 6344. N. Phil 440. 8 John 428.

existed

The interest which excludes a witness, must have existed at the time, it is said, when the act or fact in question, took place, or have accrued afterward by operation of law, or by the act of the Party who offers him. as a witness, Pea 157. 185. Phil 100.

For an interest subsequently acquired by the witnesses own act without the concurrence of the Party, does not, as it has been, said, disqualify him. Otherwise a witness might in every case deprive the party of his testimony, and the opposite party might do it. sometimes. Pea 158. 185. Skin 586. 3 L.R. 27. 33. 47. 3. John Cases 237. Phil 100. Grange 486. 3. Conn 266. 273.

let.

Thus a witness to a bond or other contract, that the party claiming will recover in the action founded upon it, he is still a competent witness for Plff and compellible to testify. Pea 158. Bull 290. Phil 100. Skin 586.

So if a Prosecutor, or other person privy to a the commission of a crime by another, lays a wager, that he will be convicted, the former is competent and compellable to testify in Gov. 152. support of the Prosecution. ibia Str 652. 1. Mc N. 145. 2. Gov 152.

So where a Broker having procured B to underwrite a policy, afterwards became underwriter himself, it was holden by 2d Kenion and Ashurst Juges, that B could not be deprived of his testimony, even if the latter had become interested in the event, 3. L.R. 27. Phil 100. 3. Camb

380. Contra Semble. Sed Quere, whether the opinion is not laid down too generally and whether the opinion on the last case is law; and indeed whether the Rule extends to any other case, than those in which the act creating the interest, is either fraudulent, that intended to deprive the Party of testimony, or merely gratuitous and idle; as in the above cases of Wagers. 1 Phil 106.2. 1. Mcth and Selwin 9. 3 Camb 380.

135
2002

For if a person acquainted with a transaction, in which others are interested, afterwards in the regular course of business & bona fide, becomes interested in the event of the suit arising out of it, he is according to the latest determinations, incompetent.

Thus when underwriter^{who} has paid the loss, upon an agreement that the insured shd refund, if his action vs another underwriter failed, was called to prove as a witness, that the policy was void; the Ct held him incompetent Phil 101.2.

But when a person having given a deposition, while uninterested, afterwards becomes interested by operation of Law, his Deposition is admissible. 2 Vesey 42. Ante 68.
Post 139.

So if he afterwards becomes a party, as heir or Executor, to the original Party. 2. Vern 699. 1. PM. 289. 2. Atkins 615. Contra if he becomes a party. Salk 286. Sts 107.
Ep 75.6.

But in these cases, the Depositions were in *testamentum* *in memoriam* to be used only after his death, and he was alive. Sed Quere whether the depositions, in these cases, were not admissible as the witness was uninterested, at the time of swearing. Ante 68.

And on the other hand, in those cases, in which a witness cannot by acquiring a subsequent interest, deprive a party of his testimony, he cannot by acquiring an

133

opposite interest privilege himself from testifying. *E.g.* *gratia*
If a subscribing witness to an obligation, becomes bail for
the debtor or party bound, he is still compellable to testify to
its execution. *Pea* 185.

But when a person who becomes interested by giving bail
for a party, afterwards comes to the knowledge of facts, ad-
vantagious to ^{the} other party, he is not compellable to testify to
such facts: as this *vi* tends to subject him on his
own bond; and his interest was antecedent to his knowledge
of the facts in question. *Phil* 101. 2. *Boot* 406.

136 But when a subsequent interest in the event, is cast
upon the witness, by operation of law, he is incompetent
to testify in support of his interest, and not compellable
to testify vs it. *E.g.* an heir apparent who being conscious
of facts relating to his ancestor's title, after succeeds
to the inheritance, So an attesting witness to a bond
who afterwards is appointed Executor or Administrator.
to obligee or obligor. *Phil* 362. 3. *N.* 1. *P.W.* 289. 2. *Horn*
699. *Str* 34. *D.* *T.R.* 372. *Exp.* 215. *12.* *East* 183. 3 *East* 7.
Ante 82. 117.

So if the interest accrued by the act or concurrence of
the party offering the witness, *E.g.* Witness to a usurious bond
becomes bail to obligee, can't testify for him, or a subscribing
witness becomes Husband or wife to one of the parties.
Pea 157. 185. 3 *John* 237. 2. *East* 183. *ante* 82.

Recapitulation 1. Interest subsequent by operation of
Law, disqualifies, and privileges on the other, 2. by act
of party offering, disqualifies, 3.^d By act of opposite
party still competent. 4.th By act of witness, without
concurrence of either party. if the act is done in the
regular course of business, disqualifies. *Peas* if Fraud
ulent, an unnecessary, wanton transaction, as a Wager.

As a general Rule, the interest which goes to the competency must also continue, till the time of trial. Hence the removal of it before the time regularly restores the competency of a witness. Pea 158. Dugg. 139. Phil 97. 8. 1. John case 200. Re [sic] 84377. 1. Mass 73.

Eg. will attested by legatee who releases it, he is competent to prove the will. Pea 159. Phil 97. 8. Vin. abt Eri 14. n 58. 1. Burr 423. 7. 4. Burns c. 6. 97. Str 1253
Powel Devises.

Day 88.
41.

As to Devises thus releasing opinions Contra by Lee and Camb. ch. P. Phil 97. n. Str 1253. 236. Powel Dev. 124. 134. 1. Day 41. Note. Upon the ^{consequence} of frauds. But the weight of authority is in support of the Rule. Phil 97. Dev. 29. 33. And now by Stat. 26. Geo. 2^d ch. 6. the legacy or Devise to a subsubscribing witness are declared void. and the witness competent to prove the will as to the residue. Pow D. 122. 3. Pea 160. st. This statute being declaratory, is in affirmance of the Rule. Pow D. 129. 1. Day 41. 48. to 88.

The Stat makes the same provisions as to Legatees, who have been paid, or have released, or refused payment on tender. Pow Dev 123. 122.

By the same Stat. creditors to testator being subscribing witnesses are declared competent, tho' their debts are charged by the will on lands. Pow Dev 122. 3. 133. 4.

We have a similar Stat as to Devises and Legatees, in wills executed after Jan. 1. 1808. provided the instrument is not otherwise sufficiently attested, in wh case the Devise or legacy will be good, and Proviso, the devise or legacy is not given to an heir at law of the Testator, if given to an heir, he can't testify in support of the will, and of course all the dispositions in ill of real estate are void. unless

145
it is sufficiently attested without his name. (Stat of Com
683.) The object of this exception is, to protect heirs
who are witnesses vs the loss of their patrimony.

By the English Stat *supra*, a subscribing witness being a
legatee, who dies before Testator or before recovering or
before releasing the Legacy, is a legal attesting witness. See
161. Note. Proof of an or his attestation, made as in other
cases, when a subscribing witness is dead.

It follows from the last Gen ^{a release} Rule, to or from an interested
witness as the case may require, or any other means, by wh,
he is divested of interest at the time of examination will
restore his competency. Phil 97. 8. Pea 158. Doug 139. Post 149.

138
case

Thus in the case of forgery, if the person whom the instrument
purports to bind, has been released, by the party who wd
be entitled to recover, upon it or enforce it, if genuine, he
is competent to prove the forgery. Phil 98. 1. Leach 178.
184.255. 1. 69. N. 2. So if the latter party, has before set
aside the instrument by a judgment of a Ct. Bull 289. Pea
169. ante 110.

So in an action by an indorsee of a Note vs maker,
an indorser being released, is competent witness for the
Plaintiff. 1. Mass 173. Phil 97.

So a servant, for whose neglect the master is
sued, may on being released testify for him. Pe 166. cases 53.
Bra 183 Phil 98. 6. ante 131. ^{Mass 100} Pea R 53.

So a bankrupt who has obtained his certificate and
given his release to his assignees, may testify for them, to
prove property in himself and thus increase the fund,
Phil 98. 57. Pea 169. Bull 43. 1 R 497. ante 122.

But not to support the Commission. ante 123.

As to members of Corporations suing and sued Vide 118
ante.

And when a release, payment &c, to or from a witness, and if accepted, restore his competency, a tender of it on the one side, tho' refused on the other, will have the same effect. Phil 49. Pea 158. Doug 134. 3 F.R. 35. 2. Johns 170.

Thus if a Legatee or Devisee being a subscribing witness to a will, tenders a release which is refused, he is competent to prove the will, or if payment of the legacy has been tendered to him and he has refused, he is competent and compellable to testify. Phil 98. Pea 158. 9. N. Doug 134. 3 F.R. 35. 1. Bull 459. 17. 1. Burr 17. 459.

So doubtless a servant, for whose negligence the Master is sued, is compellable to testify, for the Master, upon a release ~~and~~ being tendered by the Master, tho' refused. Pea 158. So of a bondsman for a prosecution, if a release is tendered him by Deft.

But if a person gives a deposition, while interested in the Event and his interest is afterwards removed, the deposition is not admissible. For at the time of his testimony, he is under the bias of interest. Phil 97. N. 1. Cases Re 14. 3. Binn 311. Eg Deft's bail gives a deposition in his favour, and the bail is afterwards changed.

138

A person is always competent to testify vs his own interest, tho' it is said, not generally compellable to do so. Pea 160. 184. Palk 691. ante 34. Ld Raymond 1008. Str 406. Doug 572. 7. F.R. 178.

Persons are in some cases incompetent by reason of the relation, in which they stand to one of the parties.

Thus Husband and wife are according to the Gen Rule incompetent either for or vs each other. Pea 172. 3. Phil 63. 4. Co Litt 60. Bull 286. Gill 119. 2. Hawk c. 46. 70. 1. Black. 443. 4 F.R. 678. ante 15. vide husband and wife 52.

For the particular rules and distinctions under the

this head vide title Husband & wife 52.6. Parent and child 70. ante 15.

Persons living as Husband and wife may upon the question as to the legitimacy of their issue be admitted as witnesses: but with regard to facts, they are competent to prove, see references *Supra* and Pea 182. Phil 180. 6. 4 R. 330.

Counselors, Attorneys & Solicitors are neither compellable nor permitted to swear to confidential communications, made by Clients in relation to suits pending or in contemplation. Pea 176.7. Phil 103.4.10. Mod 40. 1. Bern 197. Bull 284. 4 R 432. 753.

o Nor is either of them compellable to produce a paper committed to him by a client in another cause. Phil 103. N. 1. Mass 370. 3 Day 499.

So tho' the suit in controversy, to which the communications relate, is at an end, or tho' the Counselor &c has been dismissed. Pea 178. Phil 103. 4 R 759. 60. 2. Camp 578. 1 Esp 695. Nor can he testify in one case as to facts thus disclosed in another suit between other parties, *ibid*.

These rules are founded on the privilege not of counsel, &c but of the client and the obligation of secrecy never ends, or ceases. Phil 103. 1. Esp 695. 4 R 758. 9.

The rule holds as to an interpreter, between the party and his Counsel &c. he being the organ of communication between them, is under the same obligation of secrecy. Phil 103. Pe 178. cases. 77.8. 4 R 756.

But this privilege of the client is confined to ^{such} communications as are made respecting professional business, and during the relation of Attorney and Client. 3 John cases 198. 1. M & P 241. 1. Cases R 157.

Hence an Attorney by profession, but not retained as such, is not within the rule, tho' he may have been consulted confidentially. as For in such a case the relation does not exist. Phil 103. Pe 170. 4 R 753. 60.

If the client waives his privilege, the Attorney is allowed and compellable to testify. Phil 103. But the person, who was confidentially consulted upon the supposition of his being an Attorney when he was not, has been holden compellable to testify to the disclosures made to him. Phil 103. 6 Cr. 113. *See* *Quere*.

And propositions made by an Atty authorized to make them to the adverse party, may be proved by a third person who heard them, tho' not by the Atty himself. Phil 103. 4. 2 Camp 10. for the privilege extends only to those cases of Atty, Counsel & Solicitor.

Hence Physicians and Surgeons are compellable to disclose information acquired in their professional characters. Pea 104. 186. 4 Cr. 159. Pea cases 77.

So of a Romish Priest to whom confession has been made, according to the practice of the Catholic Church. Pea 180. cases 77. Phil 105. N. 1. Mc N 253. So a forger of a private confidential friend to whom disclosures have been made under an injunction of secrecy. Pe 2 180. Phil 104. cases 77. See Bull 284.

And it has been ruled that a clerk to Commissioners of a tax, who had taken an oath of office, not to disclose what he should learn as clerk, was compellable to disclose on the ground, that in such an oath there is an implied exception as to Ovi required in a Ct of Law or that it extends only to voluntary and extrajudicial disclosures. Phil 104. 64. 3 Camb 337.

And an Atty, as to a party in a cause, may be examined as to facts known to him before he was retained or addressed as such; for he does not in such case acquire his knowledge by the relation of his client, the disclosure violates no professional confidence. Phil 105. 1. Vern 117. 10. Mod 40. 4 T R. 754. 1. Verr 63. 2. Do 185.

112

So when he has attested an instrument to which his client^{is} is a party, he may be examined as to the execution of it, for the act of the attestation is not done by him as Atty but as a witness solicited by the parties. Phil 105. Pea 178. 9. Cases 108. 5 Ex 52. 4 Ex 285.

So if he was present when his client swore to an answer in Chancery, he may be examined as to the facts of the latter's swearing, on an Indictment for perjury. Pea 178 Phil 105. Bul 284. Cowp 846 Contra Stra 1122. For the fact is not one communicated in confidence.

So in general as to any Collateral fact which he knew or might have known without any intimation from his client. Phil 105. Bull 286 11. Hales Trials 353. as in relation to the fact of an erasure in a deed or will, in which his client is interested. But where his knowledge is not derived from any disclosure by his client Phil 105. Bull 264

So as to the contents of a written notice received from the adverse party. Phil 105. 7 Ex 35.

So in debt on a bond, Plaintiff's Atty has been admitted to prove from his own knowledge, that the bond was usurious. Phil 105. Pea Cases 108.

So when after an action on a promissory note has been compromised, the plaintiff informed his Atty, that the Note had been given without consideration, B & P held that the Atty was compellable to disclose the fact. Phil 105. 4 Ex 432. Pea 179.

For as Attorney in the suit he ceases their "functus officio".

And an Atty has been compellable to disclose whether a note put into his hands for collection, was indorsed or not. Phil 105. a. 1. Cases No 258.

If an Atty interrogates a witness on trial, and the witness

in a subsequent cause wishes to vary from his answers, given to such interrogatories, the adverse party may call on the Atty to discredit his testimony by proving his former answers. Pe 79. 11. Hale Trials 253. For in this and all the preceding cases of exceptions to the Gen Rule, the Atty does not give his knowledge from the relations of his client, and therefore ^{he} violate no professional confidence. Pea 178.

It has been resolved, that a person who has put his name to an instrument to give a sanction to it, is not admissible as a witness to invalidate it, being supposed to be excluded by a species of Estoppel. *Walters vs Shelly*. 17. Pe 296. The rule appears to have been first adopted in the case cited *Phil 33*. 2. Pea 181. 3. *Burr*. 1244. 1. B Pe 365.

Soon after the Rule was recognized in a limited extent as applying to Negotiable instruments only. 3. *F.R.* 34.54. Pea Cases 40. 52. 1. *Es* 298. *Phil 34 n*. Eg. in an action by endorsee vs the acceptor of a note, the indorser was held incompetent to invalidate the instrument. as by proof of usury.

But in the case of *Ferdaine vs Lashook*, the rule was denied and the former case overruled. 7. *F.R.* 601. and Pea Cas 117. *Es* 176. *Pin Evi* 96. 105. *Bennet* 464. In several of the United States, the Rule has been recognised, as limited above to negotiable instruments. 2 *Dal* 194. 1. *Day*. 17. 303. 1. *Caines* 258. 267. 2 *Mod* 465. 2 *Job* 165. 4 *Mass* R 156. 516. 6. *ibid*. 449. 7. *ibid* 199.

The Rule in *Ferdaine vs Lashook*. has finally been adopted in Conn. 1. *Conn Rep*. 260. and as

I conceive very correctly, for the objections to it, go rather to the proof of the fact, than

the incompetency of the witness. According even to this Rule, or rather case he is competent to prove subsequent facts which do not render the instrument originally void. Phil 34. Pea Cas. 52. 6. Mass 27. 11 John 128. 1. Mass 470.

Examination of Witnesses.

Objections to the competency of a witness ^{may} must be taken by examining him, before he is sworn, in chief, upon the "Voire Dire", by the testimony of other witnesses swearing to the facts, which render him incompetent, or upon his own examination; when sworn in Chief. Pea 186. Phil 96. 56. 1. W. Eve 104. 10. Mod 193. Pea 186. 1. 1. R. 719.

Formerly the objection could be taken only in one of the two modes. But as the practice now is, the objection may be taken, after he has been sworn and examined in chief and indeed when it is discovered at any time during the trial, if he is incompetent, he may be rejected. Pea 186. Phil 96. 1. 1. R. 719. 1. Esp 39. Phil 204. Law Chaney. 1. Mod 463. 6. Pohn 523. 7.

The mere fact that a witness is discovered after the trial, to have been incompetent, is not sufficient ground for a new trial, tho it may have weight in connexion with other facts. Pea 187. 1. 1. R. 719. Note New Trials

Upon the "Voire Dire" no question is proper except such as go to the competency of the witness. Such as relate merely to his credit are inadmissible under that oath. The sole object of examining a witness under that oath being to exclude him. 1. Mc N 147. 208.

Upon an examination under a "Voire Dire" a witness may be interrogated as to instruments executed

by him; or other papers which create an interest in him, without producing them. For the party objecting is supposed not to know what witnesses will be called vs him and of course not prepared with Evi of his incompetency. Pea 187. 2 Stark 433.

An objection arising from witness's answers on the Voire Dire may be removed by answers under the same oath. Phil 96. And the last rule holds as well in the latter case as in the former. Hence if upon the "Voire Dire" a witness confesses himself to have been interested, he may restore his competency by his oath own testimony under the same oath, without producing the record or instrument by wh his interest has been extinguished. Eg that he has become a Bankrupt and has received his certificate. That tho' formerly member of a Corporation which is a party, he has been disfranchised &c Pea 187. 1 Root 226. Phil 97. 3. Pea Cas 218. 1. Esp 162. 15 East 57. For as the party objecting makes the witness his own for this purpose, he cant object to such answers as operate vs himself, and the record by the testimony of the witness himself may be removed by his own testimony.

Locus if his original interest is proved by other witnesses, in this case, the certificate must be produced to restore his competency. Here the party objecting does not make the witness his own. Pea 187.

If a release is given to a witness for the purpose of restoring his competency, it must be produced. Pea 187. If the ^{int} _{me} is disclosed by himself upon the "Voire Dire".

The declarations of a witness himself before trial that he is interested, is not Evi to exclude him.

If it was, he might by a falsehood without oath wrongfully deprive a party of his testimony without liability for the falsehood. Phil 96. 5. Mass 261.

But proof of such a declaration made by the party offering his testimony, will exclude him. Phil 96. 8 Mass 487. 487.

If the party objecting to a witness, examine him upon the "Voire Dire" he is bound by his election and cannot afterwards call other witnesses to prove his incompetency, and the Rule holds, E converso. Phil 97. H C 1. Dall 242. 1. Mass 219. Pea 186. 10. Mod 192.

Ball
297

Note the Rule is the same when a witness has been examined as to his interest, under the general oath. And it applies also to Depositions taken before a Magistrate. 3 Day 214. In the former case, however the party may introduce other Evi to prove his interest, to discredit, tho' not reject him, or exclude him. Pea 186.

The Attendance of Witnesses how compelled.

The ordinary mode of witnesses being compelled or of compelling witnesses, in civil cases, is by writ of Subpoena ad testificandum. Pea 191. Phil 3 and

If the witness is in the possession of any deed or writing, which is thought necessary at the time, he may be compelled by a special clause in the writ called a "Duces tecum", to bring it into Court. Pea 191. Phil 12.

But tho' the witness is bound unconditionally to bring the writing into Ct. the question whether the party is entitled to have it read in Evi, may still be submitted to the Judge. Phil 12. 9. East 485. 14. Johns 391.

And the witness is never compellable to shew any writing, which is Evi of his own, or which would subject himself to any claim. as no one is bound to

furnish Evi vs himself, or to expose his own private writings for the benefit of Strangers. Pea 191.7. La Appx 35.9. 1. Ep 408. As to the mode of serving the Subpoena in Engd, see 92. Pea, Phil 4.5. Mod 355.

In Conn it is served either by sending, or a certified copy left with the witness, or at his usual residence.

It must be served in a reasonable time, tho no precise period is fixed. Pea 192. Str 510. 2 Syd 807.

In England, the writ issues from the Ct, before which the witness is required to appear. In Conn it may be issued either by the Court in which he or by a Magistrate as a Justice of Peace or Assistant Sc. Str 105. 11 Court 654.

A witness tho' subpoenaed is not bound to attend in civil cases, unless a reasonable sum to defray his expenses in going to, remaining at, and returning from, the place of trial, is tendered to him or unless he waives it. Pea 192. Str 1150. Phil 8.

If ^{after} due service and tender of a reasonable sum for his expenses, the witness neglects to appear, he is liable either to an action on the case for damages, - to an attachment for a contempt. Doug 540. or to an action on the Stat 5 of Eliz, in England. And in Conn a similar statute for a penalty, and also for a further recompence given by the same Sta, both to be recovered by the party aggrieved. Pea 192. Doug. 635. Phil 4. 1. Str 501. 2 Do 810. 1050. 1150. Cow 846 & Burn 1329. Camb 449.

In England, however, the action for further recompence under St of Eliz will not lie, unless the amount has been previously ascertained by the Ct out of which the process issued. But assessment being made, debt will lie for it. Phil 4. Day 535. Doug 535.

Note the Stat of Eliz expressly refers the assessment to the discretion of the Judges of the court, out of which the process issued. Tho' this is construed to mean the Ct out of which, &c not the Judge.

This Rule, I G. trusts, does not obtain in Conn, the provisions of our Stat as to the further recompence being very different from that of the English. providing for a recovery by action, bill, plaint or information &c.

But the most usual mode of proceeding in England is attachment. Phil 5. Stra 1050. In 108. under which the witness may be fined for contempt and imprisoned till he pays, not only the fine, but the damages sustained by the party. In Eri 108. Doug 540.

In Conn if a witness after due service and tender neglect to appear, a Capias may issue to bring him before the Ct to testify.

But this proceeding is not like the original attachment, means of pecuniary recompence to the party. The course of proceeding by attachment for that purpose, has not been in use here, tho' there is no legal impediment to its being introduced.

Note wd not the Rule be the same whether he if he attended, whether he called to testify or not

If the person wanted as a witness is in custody under lawful authority, or being on board of a public ship under an officer who refused to allow his attendance, the Subpoena being ineffectual, the process to compel attendance is a Writ of Habeas Corpus ad testificandum by this process he is kept in custody and returned to his former situation. Pea 192 2 Phil 9. Foster 396. Cro 672.

If the prisoner wanted is prisoner of war, the writ will not issue without the consent of the executive.

or of a Member of State as he is subject to the orders of the Executive authority. Pea 193. Phil 10. Doug 419.

In such case however, he may by consent, be examined upon interrogatories without being bro't up.

So in England if in Custody upon charge of High Treason Talk 193.

In criminal cases witnesses may be compelled to appear either by subpoena or by being bound in a recognizance to appear. If they refuse to enter into such recognizance, they may be committed for contempt. Phil 7. 2 Hale. Pea Cas 261.

In Conn, the party accused of a crime, is also entitled to a subpoena for the provision of his own or in his own favour in the English Law see Phil 7. 2 Hawk 46. 17.

In criminal cases witnesses are bound to appear for the public without any previous tender of money for their expences And by the Com Law, there is no provision for reimbursing them. Phil 8. It is now otherwise by Statute. 27. Geo 2 § 18 Geo 3.

The person of a witness attending of a ^{cause} ~~affair~~ is protected from arrest in civil process, and this protection covers the time of his going, attending at and returning from the place of trial. Pea 193. Phil 56. B R 1113.

And in general a subpoena is not necessary for his protection; if he attends upon a private request, he is not within the privilege Phil 5. 6. 8 I R 506. Contra Mass 264. Phil 6 n. 7. John 538. Same Rule holds of a witness attending from another state, tho' his attendance, could not be compelled. 2 John 294. Phil 6. This principle has been extended to parties attending upon arbitration under an order of Vice Prius. Pea 193. Phil 6.

A reasonable time is allowed him for going to the place of trial, and returning and in determining what is a liberal time the protection of Cts is liberat. *Rea* 193. *Phil* 6. 2 *R R* 1113. *Str* 986. 13. *East* 16. 4 *Dall* 329.

13.
2

If arrested in violation of his privilege, the Ct on which he is attending, will on motion discharge him. *Rea* 193. "The usual practice is in Conn to obtain a written protection from the Ct. But this is unnecessary, tho convenient in furnishing evidence of the privilege to the officers.

Depositions.

In England when a material witness resides abroad, he may under an order of the Ct, or in vacation, if a Judge, be examined *de bene esse* upon interrogatories before Commissioners, but this it seems, is not done without consent of both parties. *Phil* 10. 271. *Rea* 60. 2 *Fidd* 812. In Conn, this proceeding is never necessary, tho provided for by statute.

So if such witness is about to leave the country, and if at the time of the trial, the witness has left the country, or is out of it the deposition so taken may be read in Evidence. *Phil* 272. *Talk* 692. 1. 6 *Esp* 12. 1. *John* cases 103. 147.

So too if he is in the country at the time of trial. *Phil* 172. If the opposite party will not consent to the examination the Ct will put off the trial. That the party may file a bill in Equity as before mentioned till consent is obtained, or the witness comes into the Country. *Phil* 10. *Doug* 419. *Cow* 174. 1. *Dos* and *P* 211.

But this will not not be done to enable the party to set up an odious defence, as that the Plaintiff is his slave, or an alien enemy. *Phil* 11. 1. *Bl* & 454.

End of evidence

Bills of Exchange

Consideration 132 Foreign Bill of Exchange
 133 Bankers Checks 133. Parties 134
 Binding power of Parties 136.
 Requisites 138 Illegal Consideration 142
 Constriction Lex Loci 144. Delivery
 its effect 144. Acceptance 149.
 acceptance may be Absolute.
 Partial or Conditional 150
 Conditional 153. Partial 153. Notice
 157. Nonacceptance and Protest. 159
 acceptance *Supra* Protest 164.
 Mode of acceptance *Supra* Protest
 165. Transfer and Negotiation of
 Bills 167. Presentment 175. Time
 of Presentment 177. Usance 179.
 Payment *Supra* Protest 182.
 Promissory Notes 184. Bankers Cash
 Notes 184 Remedies on a Bill or
 Note 186 Declaration 188. Evidence
 192. Action of Debt 197.

Law Merchant.
Bills of Exchange.

B.

128.

A bill of exchange is an open letter of request, addressed by one person to another, desiring the latter to pay a sum of money to a third person, or to any other, to whom that person shall order it to be paid or to the holder, that is, the bearer. *Ld Raymond 175. Ryd B. 3. 13. 17. Chitty 37.40. Ryd 3. 2. Bl 466. f. 3. Bl 436.*

It may be drawn then payable "to A or order," "to the order of A" "to A or bearer," to bearer generally. *2 Burr 1517. 27. 1. Miles 190. Ch 47. 107. 8.*

the Bill, is called "The person who makes or draws the Bill, is called the "Drawer, (the person to whom addressed the "Drawee,") or if he undertakes to pay it, the Acceptor, and the person to whom it is payable ~~the~~ whether specially named or not, the "Payee," or if he appoint another to receive the money, he is then an "Indorser," and the one to whom he endorses it, the "Indorsee," and any one in the possession of it, the "Holder" *Ryd 4. 2 B 467. 1. HBl 586. 602. Chil 13. 22. 3*

It is an assignment of debt, due from Drawer to Drawee, in legal presumption *1. HBl 602. Ch 13.*

It differs from a common draft or order by being "Negotiable." A negotiable instrmt is one in which the legal as well as equitable interest may be assigned to a third person not originally a party to it - that is the debt or duty raised by it is assignable at Law. So that the assignee may sustain an action upon it at Law in his own name. As the Assignee vs the Drawee or when the Drawee makes himself Acceptor, Assignee vs Acceptor in case he refuses to pay the bill. *2 B. 336. 397. 444. Ch. 23. 108. Co Litt 268. a N 292. Cn. 2 Roll 45. 6. 1. Miles 211. 1. PR 341. Ch 7. 8. 7 PR 243.*

This is opposed to the rules of the Common Law in relation to choses in action generally. The general rule being, that a chose in action cannot be assigned, because it tends to litigation and maintenance. 1. John 265. 232. 6. 1. Wilson 2th. The meaning of the Rule is, that the legal interest in a debt raised, and secured by the instrument, cannot be assigned. So that the Assignee cannot maintain an action in his own name, at Law. Eg. A bond or Note payable to A and sold by him to B. It must be sued in A's name. Ch 108.

Hence the obligor at Law may release the debt after assignment and notice of that assignment to the obligor. Chy 6. 1. R 663. 1. Bond P 44. Mlyn 60. 2. Roll 45. 60. Ch 3. 5. 6. 2 Bl 442.

Purchasing a chose in action was formerly held maintenance. In N. State, State, it has been virtually determined that all choses in action are negotiable, except bringing the action in the name of Assignee. 1. John Cas. 411. 1 Johns R 531. 3 ibid 425. They are made transferable by Stat.

Chancery has always protected Assignees of choses in action, when the assignment was for a valuable consideration. So if the Assignor releases after Assignment, the Debtor may still in Chy be compelled to pay the Debt. 1. Bac 157. 2 Bl 442. Ch 4. 3. P Wms 149. 1. Vesey 411. 12 Vern 428. 450. 595. 692. Cow Co 282.

It has been determined in Penn, that in the last case, the action of fraud lies vs original debtor in favour of the assignee, if the former accepted the release after notice of assignment. If the Assignor is not able to pay. Quere. Suppose Assignor is able to pay, is not the original debtor liable in this case. 1. Root 108.

And in Eng^d and in some of the U.S. the contract of assignment, is good at Law. as between the parties

131

to it, and is construed into an implied contract or assignment agreement, that the Assignee shall have the benefit of the debt, and may use the Assignor's name to recover it. 2 B 442. Lit 125. Chit 5. 109. 2 Vern 540. 2 P Wms 608. 1. Mod 113.

Such assignment is sufficient consideration for a promise by Assignee to Assignor. 6. h. 5. 2 RR 820. 1. Roll 29.

If then the Assignor receives the money and releases the debt, he is still liable in Contract broken, that is, when the Assignment is by deed. Note a chose in action may be assigned without a deed. Litt R 683. ibid. 688. 3. Talt 304. Salk 133. 125. 1. Bowlon 317.

Sometimes the action is on the case 4. TR 690.

The interest of an Assignee of a chose in action has been for several purposes recognized in Cts of Law. Ex. that it is a sufficient consideration for a promise, so that when the Assignor of a bond, having become Bankrupt, a suit may be maintained upon it, in his name for benefit of Assignee.

So that in an action on a bond given to Plff in trust for a debt due from A to Def may be set off. Ch 5. 1. TR 619. 21. 4 Do 430. East 222. 7. TR 663. Kidd 100. Leath 5. 2 Vern 309. 2 Ph. 509. 1. Roll 29.

I Gould thinks this decision a great and lamentable departure from principle. Contra 2 Ph. 509 2 Vern 309. Kyd 108.

The negotiability of foreign bills of exchange was first recognized in Engd in the 17th century. That of Ireland not until about that time. Chan 7. 12. 14. 2. Ph 485. 6. Mod 29. 3 ibid 85. Hand 485. Ch. 16. 7. 171. Foreign 14th Century Ireland 17th Century

The rules that are laid with regard to Bills of Exchange will apply with equal force to promissory notes unless particularly excepted.

Consideration, generally upon actions of simple contracts, the Plaintiff must prove sufficient consideration. Otherwise in actions on deeds. Ch. 9. Kid 47. or 67. 3 Burr 1639. 69. 1671. 15 R. 351.

But in actions on bills of Exchange negotiated it is in general not necessary for P^lff to prove that he gave a consideration for it. Consideration in general implied or presumed, as in case of Deeds; in this respect ^{as} furnishing internal evi of consideration they resemble deeds or specialties. Hyd 118. 2d Raym^{on}. 75. 8. 3. Talk 70. Ch. 9. 51. 115. 6. 58. 2. B 445. 1. B R 487.

Exceptions, when the holder claims, as bearer of bill transferable by delivery (not as original Payee) and under suspicious circumstances. Ex if it had been lost by Payee; under such circumstances, the P^lff may be required to prove, that he or some immediate person took it as a Bona Fide Purchaser. Ch. 9. 57. 261. 209. 2. T^h 235. 3. Burr 1516. 23.

When the Holder is named as Payee or Indorsee, the writing imports consideration received.

If in settling an account for goods sold, Purchaser gives a bill of Exchange for the amount which he fails to pay, and action is brot on the Bill, he, Def cannot impeach the account, the bill being conclusive of the sum due. And in general Def is in no case admitted to prove that he received no consideration for the bill: except when the action is brot by the person with whom he was immediately concerned in the negotiation of it. as Between Drawee and Drawer. Drawer and acceptor. Drawee and Payee. Quere, whether want of consideration may be ever averred between parties in immediate privilege. 2 Cairns 246. 1. 6. Day 1. 19. N.

not in
immediate
possession!

When one takes a bill by transfer or

indorsement after it is due. In such case, any party that is sued, is in general permitted to shew by way of defence, that he received no consideration for it; or any other equitable defence, of which the holder was aware at the time of the transfer. Ch 52. 113.
1. Kid 282, 84

For a transfer after the bill is due, affords grounds of suspicion, and hence it is left to the Jury on the slightest circumstance, to presume that the transfer was known by the holder to be unfair. Ch 113. 3 PR 83.

Therefore if notice of non payment has been given, or if it can be proved otherwise, that the Holder knew of its being dishonoured, he is concluded to have taken it on the credit of the person, from whom he received it, and the above defence will prevail. 7. PR 423.

Indeed it has been said, that the holder who received it after it was due, is liable of course to all the Equity to which it was liable between the former parties. Sure 7. PR 83. 423. Ch. 114. 3 PR 83.
Contra 1. Will 230. 2 N R 170. Chitty 114.

"Foreign Bills of Exchange are those which are drawn in one country or Sovereign state and payable in another. Inland are those payable in the Country which they are drawn. Ch 16. 17. 109. 171. 7. PR 720, 3

Bankers checks or drafts on bankers are in form like bills of exchange. But they are always made payable to the bearer, are substantially bills of exchange 7. PR 423. except

They are now negotiable like bills of exchange, formerly ed not be. Ch 16. 445. 7. PR 423.

They are not payable, till demanded, in which they differ from Bills of exchange, which are payable

at a particular time. Ch 16. 171. They may be declared on as bills of exchange, tho' said not to be prodestable.
7. T R 423. 3 Burr 15. 17. 19.

They are received and treated as Cash. Ch. O.
Hyd 41. 2. La R 744. Doug 633.

If not demanded in a reasonable time, and the Banker fails, the Holder bears the loss. 1. La Rymond 744. 7. T R 423. Ch 164. 5. Hyd 442. 1 B R 1.

What a reasonable ^{time} is, was formerly a question of fact for the Jury to decide. It is now established to be a question (the facts being given) of law for the Ct to determine. Hyd 41. 1. B R 1. 1. Stra 415. 550. 910. 1248. 1175. Whether the time in any case given case has been reasonable is a mixed question, till the facts are ascertained. Ex Suppose, the Banker lives not in the same town with the Holder, the Jury will ascertain the distance, and the Ct judge of the reasonableness of the time.

Parties. It was formerly ^{held} that none but a merchant or one in trade ^{could} be a party to a bill of Exchange. Ch 19. It has, however, been long settled that all persons having understanding and legal capacity to contract, may be parties to such a bill. Salk 125. 12. Mod. 360. 380. Cath 282. 2 Vernt 292. Comb 182.

Corporations may by their agents be parties to a bill. Tho' in England certain restraints are imposed upon them by St 6. of Anne and 17. Geo 3. 12 Mod 36. Salk 125. Ch 22. Atkins 181. 2. Burr 1216.

The original parties to a bill are generally 3. (Hyd says 4) the Drawer, Drawee, & Payee. Tho' by endorsement transfer more may become parties. Ch 22. Hyd 23.

135

Indeed there may be but one party to a Bill, that is valid Ex. A draws a bill on himself payable to his own order. This, however, is rather in the nature of a promissory Note, when it is endorsed over, but it is declared upon as a Bill of Exchange. Ch 22. Cath 509. 1. Shaw 163. 3 Burr 1677. Post 281. Salk 130.

As a person not originally a party may become such by negotiation of the Bill, so by accepting the bill for the honor of Drawer or any Indorser. Thus if the Drawee refuses to accept, any one after protest may accept for the honor of the Drawer. This is called "acceptance supra protest" Ch 23. 103. 180. Styd 133. 6. Cath 129. Lud 896

So on refusal of paymt by acceptor, a stranger may make himself a party by paying the bill, for the honor of the Drawer or Indorser. This is paymt "supra protest" Ch 23. 113. 163. 4. East 112. 155.

A person may become Drawer. Indorser or Acceptor, not only by his own immediate act, but by that of his agent or Partner. The rule wd. be correct with-
=out the word partner, for he then acts as Agent.
Ch 21. 4. 9. Coke 75. B. 2d Raymond 4. 30. 6. Mod 36. 12. ibid 348. 564 In such cases, he is said to draw by procuration Ch 24.

The act of the agent being merely ministerial, Infants. Feme Coverts, Outlaws &c incapable of acting for themselves may be agents for their Principals. to make them parties to a Bill of Exchange.
Authority of Procurators.

An Agent may be constituted for the purpose by power of Atty, or by parol: for a bill of Exchange is not a deed. No person can make a deed as Agent, without power of Atty by deed. Chy 24. 5. 6. 12. Mod 564.

7. I.R. 209. 3. ibid 757. 67. 1. Espinass 111.

A general agent, that is one acting under a general authority, may bind his principal to any extent.

But a special agent, that is, one with a special limited authority, can bind his Principal, only the extent to which his authority goes. 2 I.R. 618. 1. ibid 155. 6. I.R. 591.

A person signing a blank paper, and giving it to another authorizing ^{ed} the latter to fill it up with any sum, in England with any sum, the stamp will warrant. Other-wise of deeds. Vide Title by Deed, Chit 25. 56. Doug 9 cases 514. 1. H.B. 313. Ryd 110. Pe 42. La Raymond 930. Camb 26. 7.

As to authority implied and authority by assent subsequently given. See Master and Servant.

An Agent cannot delegate his authority, unless expressly authorized so to do. 9 Cok 75. 1. Roll 330. Chit 27. 9. 75. 96.

In drawing, indorsing or accepting for a Principal, the Agent must do the act in the name of the Principal, otherwise the agent is bound and not the Principal.

Ryd 86. Strange 705. 958. 6. I.R. 171. 1. I.R. 181. Hard, w 3.5. A.B. by C.D. his attorney is the usual form. If he sign his own name merely, he is bound and not the Principal.

The incapacity of the Drawer of the bill will not discharge the subsequent indorsers from a suit commenced by the holder. It is binding on all parties except those legally incapacitated, for the indorsement in legal effect creates a new bill. Str 705. 956. 6. I.R. 171. Chit 21.

Binding power of Partners. One of two joint

13/1
holders, or partners may be acceptor in the name of both or the firm, if the bill concerns their trade, that is, the trade of the Company. Chit 27. 28. La Raymond 175. 1485. Salk 292. 125. T. 4 R 207. 12. Moa 354. 2 Vern 277. Lea R 16. Backn Merchant.

It is said, however, that the act of one in the name of the firm, if it concern his separate interest only, will not bind the firm. Salk 125. Chit 28. Pe R 80. 2 Vern 277. 292. Esp 522. Quere !!! see Partnerships 211 p.

It seems, now, that the act of one in the name of the firm, tho' for his own benefit, will bind the firm, if the Holder of the bill, did not know, that it was for the separate benefit of the Drawer.

It has been holden, that two persons by making a bill payable to them or their order, make themselves partners to that transaction, so that one may indorse for both. La Mansfield admitted in such case the evi of Merchants that the indorsemt was invalid, because not endorsed by both. But in that case, the indorsement was not in the name of both. Chit 29. 30. Doug 653. Lea 16. Mat Partn 253. 254.

Where one partner draws for himself and partner he should do it in the name of the firm. Otherwise it is doubtful whether the other will be bound (ut supra Pe 126. La Raymond, 175. 1484.

It is a general Rule, that where one of two innocent persons must suffer, he must be the sufferer who was the cause of it.

Form and Requisites of a Bill.

No particular form or sett of words is necessary to the creation of a Bill of Exchange. Chit 31. 58. 10. Moa 287. 8. ibid 354. 3 Wils 213. La Raymond 1396. Str 629. Esp 129.

Kyd 61. 601. Com D R 12. Egratia. I promise to account

with A or his order for 250.£. This is construed to pay, as a promise to pay. It is a good bill and This Rule is the same with regard to Promissory Notes.

But it must possess certain essential qualifications, without which it will not operate as an Instrument, but as mere evidence of a Parol contract, that is, without these requisites it will not carry with it internal ev of a consideration, nor be negotiable, that is, it will not be a bill of Exchange. Chit. 32.3. 173. 184. 5. T.R. 485. 2 Bl & 1072. 3 Wils 213. 2 East 360. Ld Raymond 1545.

The Requisites are.
payable. First. that the Instrmt should be payable at all events, and not upon contingency. Second, that it be for money only and not for collateral articles, or for the paymt of money, and not for the performance of any other acts. Chit 35. Rya 50. 3. Wils 12. 13. 213. 2 Atkins 1091. 5. T.R. 485. Do 241. Ld Raymd 1362. Camb 227. Str 1151. 1271.

So if payable out of particular fund which may not be productive, it is not negotiable nor can it be so. Chit 33. 5. Str 482. 4 Do 4. 343. 7. Do 242. Ld Raymd 485. Do 241. D 1362. 1396. 1563.

It must import a personal credit to the Drawer. Str 1151. Camb 227. 4 Moa 242. 5. Moa 265. 10 Do 294. Str 1 Rya 512.

see
38
140

It seems however, that such an instrument is considered and may be declared on as a bill of exchange between the original parties to the instrmt as between Drawer and Payee. Chit 32.3. 84. 48. 7. Tra 243. 5. Do 485. Rya 1.8. 2. Atkins 1072. Contra that a bill is nothing between the parties but evidence of a contract 6. Tra 123. 3. Wils 211. 2 Bla 1072. But the Rule seems now to be settled. Chit 48. 6 T.R. 123. 7. T.R. 423. 1. Rya 65.

25

There is an exception to the Gen. Rule, when the event is morally certain, and of notoriety and respects trade. It may be good, tho' payable out of a particular fund. Example, payable after such a ship is paid off, or on the receipt of pay or wages from a certain ship. Chit 33. Str 24. Wils 262. 1 Ryd 57.

And if the event on which it is made payable, is one which must inevitably happen, at some future period, the bill (being for money) will in all respects be a good one, Ex payable one month after A's death, or when an infant shall obtain full age. the time being specified. Chit 34 Str 121. 1. Pin 226. Ryd 57.

The mentioning of a particular fund only by way of pointing out the Drawer, how to reimburse himself, will not vitiate a bill. Ex 100 Dols as my half pay to be due on such a day by advances. 7. 4th R. 733. Chit 34 Strange 762. La Raym'd 1481. Doug 57. Ryd 57.

It imports a present credit to the Drawer.

So of words pointing out the consideration of acceptance Ex value received out of my estate in A. or being portion of a value deposited as security for the paymt thereof. or hereof. Chit 34. La Raym'd 1545. 7. 4th R. 733. Peln 37.

Second, for the paymt of money only. Hence an order payable in goods, is no bill of exchange. Because the Instrument was devised for facilitating remittances. Not as a medium of Barter. Besides if orders for goods were negotiable, they wd very much perplex commerce, by the means afforded of oppressing the parties bound. Ex by a transfer to a distant Indorsee. Chit 34. Ryd 50.

It must not only be payable in money, but money only for the same reasons. Hence an Instrument for money and goods, or for money and some act to

be done is no bill of exchange Chit 35. Ryd 50. Stra 127.
10. Mod 287. Ryd 66

An order which can't be complied with but by the
payment of money, is for money only Ryd 60.2. Bl. & 1070

It is not to be concluded, that these instruments when de-
ficient in any of the foregoing requisites are of no force.
They are not bills of exchange, but may be used as
evidence of a contract between the original parties..
Ex If the contingency has happened, it may be declared
as a bill between the original parties. 1 Ryd 58. 65. 2
Atkins 1072.

The addition of any thing extraneous, will not vitiate
a Bill. Ex mentioning a reason for drawing it. Ryd 61.
Stra 706.

In case of Foreign Bills it is usual, to make
three of the same tenor, that if one be lost the money
may be received. Chit 65. 55. 6. B. 1. 13. But in such case
to prevent the sum being paid more than once, each part
should refer to the others and to be payable on condition,
that neither of the others have been paid.

The Bill shd specify to whom it to be paid, as A
or to Bearer. But it is said, if the bill does not des-
ignate any Payee by name or otherwise, but mention of
whom the value is received, he is to be the Payee.

Judge Gould thinks this questionable. Chit 45. 1.
H B 608. Potter 31. Chitty 46.

As to Bills payable to fictitious Payee's or order, it now seems
settled, that such a bill is in legal effect payable to
bearer, as against such parties, as knew the Payee to be
fictitious, and no other. Chit 47. 8. 59. 61. 107. 202. 3. & Re
174. 182. 481. 177. Bl 313. 386. 569. 1. Do 194. 288. 1. Ryd 208.

Such bills have been highly censured. and it is said,

that the person endorsing the fictitious name wd be guilty of forgery. Chit 48. 1. Ryd 219. 28.

A bill payable to one for the use of another, is valid. Thin 264. Ryd 108. 6 Str 123. 1. 16 B 313. Chit 48. 112. Cath 5. 2 Vent 307.

A bill to be negotiable, must contain operative words of transfer. As to A or order, to the Bearer of A. to A or his assignee. So A or bearer, to bearer or the order of Drawer. Strang 12. Chit 187. 8 Cath 403. 3 Wils 211. 3. Wils 353. Ryd 36. 63. 108. Chit 48.

A bill payable to the order of A. has the same effect, and operation, as one payable to A or his order. Chit 134. 187. Ryd 108. Cath 48.

It is now settled, that the words, "value received", are not necessary in a bill or endorsement. Value or consideration is presumed or implied. Fos 282. 12. Mod 3 45. 3. Wils 212. Ryd 61. 2. Str 142. Thin 346. 1. Burr 85. Chit 502. 1. Ryd 118. Boyl 13. N. B. 1. Mod 310. La Ray 1481.

But to entitle the holder to interest and damages, against the Drawer or Indorser, these words are necessary by Statute. 9. and 10. William 3. 8. 4. Ann 1. Ryd 71. Chit 50 93. Str 910.

The cases in which holder shd ^{not} receive consideration, have already been considered. vide Page ante.

If the bill is for accommodation only, and that fact is known to the Indorser, he can receive no more, than he paid for it. tho less than the amount of the Bill. Chit 51. 1. Esp R 261. Pea R 216. 2. Caine's 248.

But when a bill is actually drawn for money actu-ally due from Drawee to Drawer, or in the regular course of business, the Indorsee tho' he has not given the full amount of the bill, may receive the whole

and the overplus, for the use of the Indorser Chit
52. 1. Esp R 261. Unintelligible to Judge Gould.

Illegal Consideration. In all cases in which,
the Def ^{may} ~~may~~ ^{over} the want of consideration, he may
aver that it was illegal. Chit 52. 1. Bl 445.

As between those parties who are immediately concerned
in the illegal consideration transaction, the illegality
of the consideration is a good defence. Ex Drawee
and Payee. Hyd 280. Doug 614.

And a third person knowing the consideration to have
been illegal, at the time of taking it, he cannot aver
on it. Chit 52. 1. Esp R 166. 6. T R 61. Contra 1. Esp 6.

I Gould says it is not Law.

It has been holden, however, that a third person, who
having put his name upon the bill, at the request of
the holder, was bound to pay it, to a bona fide purchaser
and this tho he even knew the consideration to be il-
legal. Chitt 53. Pea R 215. A volunteer only, not a party
interested, may recover of the prior party.

And in general, any holder of a bill upon fair con-
sideration and having no knowledge of the illegality
of the original consideration, may recover upon it.

This as between the original parties it is void. Str
1155. 1. Bl R 445. Chit. 53. Seld Cases. 71. 1. Hyd 277. 80
3. Doug. 614. 36. 1. T R 296. 3. ^{T Reports} ~~Donner~~ 451. 537. 513. 7. Do
607. 1. Bl R 445.

Exception when it is endorsed after
it is due, the holder is liable to the same equity as
the Indorsee. Hyd 285. 6. 8. Str R 390. 7. Do 607. 1. Esp 274.

Also in cases in which the Stat has declared a bill to
be void. Ex When the consideration is usurious. When for
money won at play, or signing a Bankrupt's certificate
Here even an innocent Indorsee can't recover of the

Drawee or Acceptor. Chit 53. Doug 646, 70. H.B. 647. 143
Strange 1155. Caith 356. Doug 708. 1. East 612. 92. I could
doubt the universality of the Rule.

Is not the ground of this doctrine merely that, if
Drawee was liable, the mischief intended to be prevented
wd be let in, in the latter case, and not the former.

Str 1155. Doug 713. 16. But in such a case the Indorser
is liable, there is a new contract and the mischief is not
let in.

And if a bill good in its creation, is endorsed
on a usurious consideration and then passed to a bona
fide purchaser he may recover of the Drawee or Acceptor
tho not against the Indorser. 1 East 92. Chit 53. 4. 1 Esp
273. 1. Lalk 294. 8 Str 390.

Bills are sometimes made payable "as Per advice"
In such case the Drawee is not to pay until further ad-
vice received. Chit 37. 55. Is this consistent with the
general rule, that it must be payable at all events?

Chitty says that the innocent holder can recover only of
the person of whom he immediately received it. I could
think Chitt did not write what he meant Chit 53.

Under one of the heads of former requisites. I shd. have
observed that the Drawers name must be subscribed or
inserted in the body of the Instrument, and it must be
written by the Drawer or some person authorized by
him. Chit 556. Brown P.B. 3. La Ray 1374. 1542. Str 399. 609.
8. Mod 307.

I could. The gen Rule that when the mischief
wd be prevented by ~~not~~ making the bill not collectable
by bona fide purchasers, then they are not so, or void in the
hands of bona fide purchasers. But otherwise when it
would not have that effect. This is the true rule, whether
the bill is void by Statute, or Common Law,

Construction Lex Loci

Bills of exchange are very literally construed, more so than Deeds. Thus where one for money acknowledged to have been borrowed and received gave a note with these words, I promise never to pay, it was holden the Payer might recover on the Instrument. Chit 58 2 Alkies 32.

It is, also by this principle of Liberal construction, that a bill payable to a fictitious Person, or order, operates as a bill of exchange the bearer being the Payer. Chit 59 60, 483. 2 Str 733, 1 B and D 141. 2 Vesy In 449, 2 H B 603, 1 Do. 126.

Generally the contract is construed and takes effect according to the Laws of the Country where it is made. Shin 277. 1 H B 126. 7 T R 242. 2 Bin 1077 Lowp 177.

As to the time of paymt, that is generally collected according to the Laws of the Country where payable, Brown Pl. 251. 1 Ky & 8. Poth P.C. 155. Chit 59.

As to the remedy, the form of it is regulated according to, or by the Laws of the country in which it is sought. But the extent of it by the Lex Loci contractus, Chit 60. 1 B and P 187, 8. Thus if one draws a bill in a country, where he cannot by law be arrested in a suit upon it, he can't holden to Bail here.

The form of the remedy must be regulated by the Laws of the country, where the remedy is sought; for it wd be a very great inconvenience, to have a new form of action for every foreign bill, but the remedy must be governed by the Lex Loci Contractus, for it is no more than justice. 5 Cranch 298. 11 John. 194.

Delivery. Its effect.

The bill is regularly to be

delivered to the Payee. And a person receiving ~~for~~ in satisfaction
 of a debt for which he has not a higher security, cast
 in general sue for the former debt. before the bill is
 due, for receiving the bill amounts to an agreement
 to give credit until that time. Skin 410. Chit 62. 12.
 Mod 517. 6. TR 62. 7. Do 64. 8. Do 453. 5. Do. 513. 1. Esp. 5.
 106. Salk 442.

If altered while in the hands of Payee
 or any other holder, in any material respect as in
 amount or date, without Drawers consent, he is discharged
 even against a subsequent Bona Fide Holder, or pur-
 chaser because it is no longer his act. Chit 62. 3. 1. TR
 320. 5. 2. 567. 2. HBl 141.

So also of Acceptor or Indorser, if altered after
 acceptance or Indorsement, without the parties consent
 it is not the Instrument accepted or indorsed. For
 no man can derive a title by Forgery at Supra. 27 Bl
 97. 9. 141. Otherwise if altered before acceptance, it
 is then, the instrument accepted and the Holder has been
 in no fault. I suppose a Bona Fide Holder is here
 meant. Chit 63. 4. 4 TR 324. Marsh 138. 40. Bi Bl 97.

And the consent of any party will stop him from
 taking advantage of the alteration

But the party making the alteration without
 the consent of the parties, can in no case aver against
 any one I conclude. For he is guilty of the fraud and
 no man can take advantage of his own wrong. 11. Co
 27. A. 4 TR 320.

The Drawer by the act of drawing and delivering
 the bill, impliedly engages, to the Payee and every sub-
 sequent Bona Fide Holder, that Drawee is legally capable
 of accepting. That he is to be found at the place described
 if it be described, in the Bill. That on due presentation
 or presentment he will accept in according to the

the tenor and that on due presentment, when due, it will be paid. Chit 63. 4, 2 Ryd 109. Doug 55. 2. Atkins 378. 1. Esp 511. Str 1087. Ld Ray 7. Same rule as to Indorsers,

Exceptions, when the Payee expressly agrees to assume all risks. So when the Payee discounts the bill, that is disposes of it to Payer, by way of sale, as to the meaning and extent of this Rule. See Case 128. 12. Moa 241. Chit 63. 180. 121. 3. 1. Ryd 709. 90. 1. 1. Esp 734. 7. 20 63. 5. 6. 1. Esp 447. Ld Ray 442.

If there is a failure of any of the above engagements, the Drawer is liable immediately, even tho' the day of payment has not arrived, to the amount of the bill, and in some cases to the damages, interest and costs, 3 Wils 1617. Esp R 52. 139. Doug 55. 65. Chit 64. 100. 130. Bin 296. 1687.

Drawer is thus liable, whether the bill was held on or on his own or a-mothers account 6. Wils 52. 139. 3 Wils 16. 17.

"This obligation is unavoidable. Thus where a bill was drawn upon one in a foreign country, who by that country's law, is prohibited from paying it, the Drawer is liable."

But the Holder may lose the benefit of these implied engagements, by his neglect Chit 68. as to the modes of losing them, see Post.

It is in some cases necessary and in all cases expedient, for the Holder, if he receives the bill before acceptance, to present it for acceptance. Chit 66. 1. Ryd 117.

When the Bill is payable on a limited time, after sight, presentment, is necessary, otherwise the time of payment wd never arrive. Chit 67. 86. 202. 1. Ryd 117. 1. H Bl 565.

In other cases, it is not necessary, tho' advantageous to present beforehand. for if the Bill is

147.
not to be accepted, he wants his remedy immediately
vs the prior parties. 5 Burr 267. 1. TR 712. Com Dig 5.
2 Show 496

And when it wd be otherwise necessary, holder may
excuse his omission by proving that neither Drawer nor
Indorser had any assets in the hands of Drawee, or
that Drawee was insolvent and known to Drawer or
any other party, it need not be so. Chit 68. 102. 132. 202.
3. 2. HBL 336. 569. Ryd 129. 136.

So by any other fact which shows, Def. has not
been injured by holder's neglect.

The Rule as to the time of presenting, when the bill
is payable after sight, is that due diligence must be
used by the Holder, that is, it must be presented within
a reasonable time, under all the circumstances. Chit
68. 9. Ryd 117. 8. 2. HBL 569. Polkier RL. 143. 7. TR 425.

So, as Chitty says, of bills not payable at sight, not
correct. Chit. 6. 7. 8. 68.

The Rule as to the time of presenting such bills, depends
or relates to the presentment for payment. presentment
for acceptance not being necessary.

What a reasonable time is, it is said to be a question
for the Jury, but being ascertained it is a Question of Law.
2. HBL 569. 7. TR 425.

It seems to be a question ^{of law} (the facts being given) for
the sake of certainty. Tho whether there has been a
reasonable notice in every particular case, is a mixed
question. Chit 69. 96. 137. 46. 53. 1. TR 167. 519. 4. ibid
148. Ryd 41. 2. 127. Dougl. 515.

Presentmt shd always be made at the usual
hours for business. Chit. 69. 148. Marsh. 112. Ryd 125.

Neglect to present at the proper time may be excused by illness or other proper cause Chit 69. 1148.

It is said that Drawee ought to accept or refuse immediately on presentment.

It is usual, however, to leave it within him 24 hours, that he may have time to examine his account with the Drawer, unless the Drawee voluntarily accepts or refuses immediately or rather sooner. If he does not accept within that time, the bill may be considered as Dishonoured.. Chit 70. 2. March 16. Ld Ray 281. 1. Hyd 126.

But it is said, that this may be done, if the Mail goes out in the mean time, in the meantime, before the expiration of the 24 hours. Marsh. 62. Com Dig. Mer. F. 6.

If the Drawee is not to be found at the place described and it appears, that he never resided there, the bill is considered as dishonoured, or if he has absconded, for this is violation of an implied engagement. Chit 70. 89. 136. 1. Esp. C. 516. Ld 743. Marsh 27. 112. Ld Ray 125. 7.

But if he has removed, presentment shd be made at the place, to which he has removed, and shd be if possible, to the Drawee himself. This is not considered as coming within the implied ^{engagement}. Chit 70. 135. 6. Strange 1087. Bayley 58.

Otherwise if he has left the Kingdom, (state perhaps) Holder is not bound to follow him. Presentment at his house, is sufficient. Judge Gould, thinks, this applies to the Deft. ^{affine} Chit 70. 1. 192. 6. 1. Esp. C. 146.

If the Drawee shd be dead, presentment shd be made

to his immediate representatives. if to be found in a reasonable distance. Chit 70. 1. 132. 6. Potkin P. C. 146.

138-

The matter of fact being ascertained by admission of the parties, or by the jurors, as the distance, mails leaving the place, &c it then becomes a matter of Law for the Ct to determine, whether the time was reasonable under all the circumstances of the case,

Acceptance Is the act of engaging to comply with the request contained in the bill and may be either in writing or by parol. Chit 70. 5. 6. 200.

Acceptance by agent is valid, but the agent if required must produce his authority to the Holder, otherwise it may be considered as dishonoured. Chit 23. 71. 5. 200.

It is doubtful, whether the holder is bound in any case to acquiesce in acceptance by agent, as it multiplies the necessity of proof. Chit 71. 2. 1. Ep & 115. 269.

Acceptance by one partner for both, binds both. But if a bill is drawn on two not Partners, and accepted by one only, the other is not bound, and it may be considered as dishonoured. Chit 29. 73. 112. Bull N. P. 119. 279. Morg 2. 16.

If drawee is proved to be, an infant, Feme covert or otherwise incapable, the bill may be treated as dishonoured for this is a breach of implied engagement. Chit 63. 71. 2.

A promise to accept in future, will operate as a present acceptance, even tho' by parol. Ex "Leave the bill and I will accept it," for it gives the bill credit and prevents its being protested. Chit 70. 6. Bull 279. Marsh 17. Cow 573. 3. East 514. 3 Burr 1669. Atkins 64.

To a promise to drawer to accept a bill to be drawn in future, is binding, if attended with circumstances which may induce a third person to take it, *Ex. A letter to Drawer says, "I will duly honor your bill"* this shown to Indorsee before he takes it, is an acceptance. *Cow 57. 75. 1. Ark 611. Barnes 454. 66. Hyd 74. 81. East 98. Cow 670. Chit 77.*

Acceptance after the day of payment will bind the Acceptor tho' the drawer and Indorser wd be discharged, unless duly notified of the new acceptance, or new payment at the day. In this case, the acceptor is liable to pay on demand. *Chit 74. 3. 81. 12. Rod 410. Lo Day 36. 574. Tark 152. 9. Cor 15. 45. Cow R 75. Barnes 224.*

Drawer tho' having effects of the drawer is not safe in accepting, after he knows of the Drawers failure; that is under the Eng Bankrupt laws. For he wd be compelled to pay over again to the drawers assignees. *Chit 74. 101. 2. Ark. R.C. 96. 2. H.R. 334.*

But if he accept without notice, he may pay after notice and will not be liable to the bankrupts assignees. *Chit 74. 153. 7. 5 & 711.*

Acceptance may be absolute, conditional or partial. But unless the acceptance is absolute, the holder may consider the bill as dishonoured. *Chit 23. 74. 103. 180. Pothier 47.*

G. Pothier is a French Author, but good authority in England and America.

If the holder is satisfied with a conditional acceptance or one varying in any way from the terms of the Bill, it may be so accepted, and if he gives due notice to the prior parties, they are not discharged by it. *Chit 74. 5. 81. 2. Str 214. 648. Camb 452. Pothier 47.*

151
Tya 132.6. Str 1102. 94. 1212. 11. 170. Mod. 11. Mod 170. 2 Hys 9.

What amounts to an acceptance is a question of law, facts being ascertained. Chit 75. Tya 74. 1. 1682.

An absolute acceptance is an engagement to pay the money according to the tenor of the Bill *Ibid*.

Acceptances are almost universally in writing - formerly they were ~~verbal~~ ^{in writing} or parol. Chit 75.

The usual mode is, by writing "Accepted" and subscribing the drawee's name, or by writing accepted only, or the name only. Chit 75. 3.

It is holden, that if a bill is payable in a city, it must by the acceptance be made payable at a particular house or place there. Chit 70. 5. Camb B 75. La Ray 574. Otherwise protestable or considered as dishonoured.

In general any act of the drawee, evincing his consent to comply with the drawer's request will amount to an acceptance. Ex "Seen". "Accepted" "presented" ⁱⁿ ^{of} the month, or a direction to a third person to pay it, if written within, upon it, or any paper relating to it. Chit 75. 6. Poth 45. Viner 6 419. Camb 40. Tya 80. Bull 270.

Writing is not necessary, verbal acceptances are binding. Marsh 1765. 1. East 113. 4. *ibid* 72. Horder 79. 278. Chit 76. Tya 60. 72. 3 Burr 1674.

So tho there is no consideration in favour of the holder as to Drawer - want of consideration must be shewn by the acceptor. It is immaterial to the Holder, whether or no, there is consideration between Drawer and drawee, tho between these two last, want of consideration may be shown. Post Chit 79. 82. 3 Burr 1669.

It is said, there is a distinction between a promise to accept in future, on a consideration executed and one that is executory, unless it empowers some one to take or return the Bill - the promise intended is one to the drawer, I suppose. Chit 77. Boyl 49. 3 Burr 1668.

A promise to accept when obtained by fraud or misrepresentation is void; that is I suppose in favour of the party procuring it by fraud. but seems I suppose as to subsequent bona fide holder Chit 77. 3 Burr 1616.

An acceptance by letter is binding. *Ibid* 69.

So acceptance may be implied. But to constitute such an acceptance, there must be some act, or circumstance for which it may be inferred, that the holder was induced to believe, that the bill was accepted. As, "There is your bill, it is all right" this will be no acceptance, unless it appears to have been intended to make the holder consider it as accepted. Str 648. Chit 76. 7. 1. Esp 17. Boyl 175. 278 1. T. R. 269.

Conditional acceptance, is an engagement to pay the bill not absolutely, but upon some contingency.

The holder is not bound to receive it, but if he does he should give notice or due notice of the nature of the acceptance to the prior parties, otherwise they are discharged. The Acceptor is bound by it, if received. As, accepted to pay as remitted for or on account of such a ship, when in for her cargo, as soon as such goods are sold. 1. T. R. 182. Chit 80. 1. 101. 2. Str 212. Cow 57. Hara 74.

A conditional acceptance becomes absolute as soon as the event on which it depends, happens. *Ibid*.

If the acceptance is in writing, the condition intended

shd be in writing also. for a verbal condition annexed to written acceptance will not avail the acceptor as any subseqt holder, if either he or any ^{inter}mediate holder took it for a valuable consideration Chit 81. Doug 286. 96 Boyle 51. Hardress 23.

Partial Acceptance. A Partial Acceptance is an unconditional one, but varying from the tenor of the bill Example engagmt to pay part. or to pay at different times, or part in money, and part in goods, or other Bills of exchange. Boyle 48. N Chit 81. Strange 214 Camb 452. Marsh 68. 85. Molloy 283. Pothier 48. N. Mod 190. Stn 1194.

The holder may refuse such acceptance, and treat the bill as dishonoured. But if received, the Acceptor is bound by it. Ut Supra.

When the acceptance is partial or conditional, the holder must, If he intends not to discharge the prior parties, give due notice of the nature of the acceptance. Chit 180. 2. Tya 161. Pothier 47.

If he gives the prior party's notice, that the bill is protested, generally he waives the acceptance. This shows he did not acquiesce in it, and induces the prior parties to make arrangements for their own safety. Chit 82. 5. 157. 1. 5 R 182.

Whether the acceptance is absolute, conditional, or partial is a question of Law. The facts which constitute the acceptance, matter of fact. They being ascertained it is matter of Law. La May 182. 1. 5 R 182.

By an absolute acceptance the acceptor is bound to pay according to the tenor of the bill. By a partial or conditional acceptance to the nature of the acceptance. Poth 116. 7. 5. 64. 4 5 R 174. Boyle 142.

Acceptance is binding in favour of third persons or Payee, tho' without consideration money to the Acceptor and that fact known to the holder. Chit 9. 50. 12. 82. Wils 187. 8. 3 TR 183. 4 ibid 332. Pothier 118. 12. Mallor 23.

Hence acceptance by an Exec^{tr} on account of a debt due from testator, is an admission of assets and will bind him personally, altho there are no assets. So of indorsmt by executor this is not affected by the stat of frauds and perjuries, for it does not concern third persons Chit 82. 111. 2. 2. HBL 622. 3. Wils 1. 2. 3 Burr 1295. 2 Stra 1260. 2 Barny 137. 1. TR 487. 2 Burr 1225.

incurred by acceptance
This obligation is ~~unrevocable~~ & can't be discharged but by paymt or an express waiver. Chit 80. Esp 47. 2 HBL 88 Pothier 76. 118. Marsh 83.

If the acceptance is in a foreign country by the laws of wh it is, or becomes invalid, it is of no effect here for the Lex Loci contractus governs. Chit 59. 604. Str 733. Feltw cases 144.

Acceptance may be waived by the holder without writing by bare consent by parol. Doug 236. 47. Chit 83. 197. Esp 47. And it has been said, what amounts to an agreemt or assent, to discharge the acceptor, is a question for the jury & Gould thinks this incorrect and not founded in principle. Doug 247. Chit 83. 4.

Quere, for it has since been decided, that in general nothing but an express consent, cd amount to a discharge of the Acceptor by the Holder. No indulgence or delay can of the holder can be construed into a discharge of the Acceptor except in the case of delay, the holder is grossly negligent. Doug 236. 47. Esp 47. Ryd 189.

A release by holder to drawee after the bill is drawn but

155
before acceptance is no discharge of the subsequent acceptance.
For the Drawee was & not liable at the time of the release.
Chit 84. La Ray 65. 518. 664. 3. 670. C

And agreement to consider the acceptance as at an end
and a message to Acceptor upon an accommodation bill
that the business was settled with Drawer and that
he need not trouble himself further, have been decided
to amount to a waiver. Does that word
accommodation make any difference Chit 84 Doug 236. 7. 96.

So an entry upon Pliffs books against the entry of
the acceptance of the bill, "Acceptance annulled" is
a waiver. Doug 237. 48. Chit 84. 156. 7.

It is doubtful whether receiving part from the drawee
and taking his promise on the back for the remainder
at a future time, will discharge the acceptance. P. G.
thinks not. It is no express waiver and works no
injury to the Acceptor, he being first liable. 2 Wils
262. 1. Esp 517. Doug 248. Chit 84. 156. 7.

It has been holden, that the alteration by a holder of
a partial into an absolute acceptance, and on refusal
to conform to the alteration, restoring it to its original
form, does not discharge the partial acceptance. P. G.
thinks this incorrect Chit 85. Barnes 222 Malloy 28.
47 Re 336. See Hargery.

If the holder agrees not to sue the Acceptor, if
the latter will make Affidavit, that the acceptance
is forged, and he swears to it, Acceptor is discharged
tho the Affidavit is false. The conditional waiver
is complied with. Chit 85. Re 187. 1. Esp 178. Byle 488.

When there is a future consignment to the Acceptor,
and the ~~profits~~ prospect of profit upon it, is

the consideration of acceptance, the holder agreeing to take the bill of lading from the Acceptor, discharges him. Chit 88

It has been holden, that if the drawer ^{ie} by acceptance makes the money payable at a certain bankers, & it has not been sent there for payment, the Acceptor is discharged if he wd sustain damage by the holders neglect. As Banker afterwards fails. Chit 85. 6. Str 1195. Boyle 78.

So a conditional or partial acceptance is discharged by notice of a general non acceptance. Chit 82. 3. J. T. R. 182.

The ^{act of} acceptance, that is where ~~the~~ the terms of it imply nothing to the contrary, implies that the Acceptor has effects of the Drawer. Chit 191. 203. 5. Hyd 86. 1. Wil 185. Falk 190. La Ray 88.

If then the drawer is compelled to pay, he may recover vs the Acceptor. Hyd 186. 1. Wil 185.

But if the Acceptor has no effects of the Drawer and pays the bills; he has his remedy vs the drawer, Hyd 156. Chit 113. 113. 191. 203

But as to all other parties, the Acceptor is considered as the original debtor. First Liab. Hyd 156. Wil 185. 190. Falk 127.

If the Holder makes the Acceptor, his executor & dies, the latter is discharged, and indeed all other prior parties. This is at Law, but in Equity this Rule is qualified. Chit 181. 1. Falk 422 Falk 289. 99 2 Day 511. 2. & Do 18. Plow 184. 540.

Notice

187.

Non acceptance is a refusal or omission to comply with the terms of the (Bill) request in the Bill. Chit 54 65. 86. 5. Burr 2670. 1. T.R. 712. 1. Vint 40. Bath 133. Doug 658.

Presentmt of a bill is necessary only in case of a bill, being payable at a fixed time after sight

But, in that or in any other case, presentmt for acceptance is made and acceptance wholly refused, or offered only conditionally or partially, notice must be given to the prior parties. or they will generally be discharged. It is necessary that the prior parties secure themselves. Ut supra.

Formerly it was holden that a prior party, insisting on want of notice, must prove damages sustained by the omission. Chit 87. 1. Shaw 318. Camb 182. 12. Mod 15.

It is now settled, that this is not necessary. Drawer is presumed to have had effects in Acceptors, and Indorsee to have given value for the bill. Therefore holder must prove the prior party (tho Def) not to have sustained damages, on facts affording inference to shift the Onus probandi Chit 87. 202. B. 2. 5. 1. T.R. 406. 9. 3. Do 182. 2. H.R. 612. 1.

Shaw 317. 1. T.R. 129. 1. Deth 40.

If at the date or time of paymt, Drawer had no effects in Drawee's hands, He is prima facie not entitled to notice. But if he had effects, the fact that he sustained no actual damage, by the want of notice does not dispense with the necessity of it. 5. T.R. 259. Chit 87. 202. 2. H.R. 610. 3. C. & P. 333. 1. T.R. 129. 1. Deth 652. 5. Do 252. 2. C. & P. 315. 551. Do 158. 7. East 359.

To the Payee of a promissory Note indorsing it, with a knowledge of maker's insolvency, can't defend on the

of want of notice, Chit 87. 8. 2. H&A 336, 609. 2. Esp & 302. 2. Cairnes 353. 13 Est. 187. 7. 339

The Indorsee has assets in Drawers hands, yet if Drawee has none, the Drawer can't avail himself of want of notice. Chit 88. 1. Esp & 515.

Securities lodged by Drawer with Drawee for the purpose of raising money, but on which none is raised, are not such effects, as to enable Drawer to defend for want of notice, There is no indebtedness. Chit 88. 1. Esp & 516.

But if the Drawee had effects at the time of making the bill, no subsequent event or occurrence will dispense with the necessity of notice. Tho' notice might not be of any use. As in the case of death, bankruptcy or known insolvency of the Drawee 1. T&A 508. 408. 2. Do 336. 2. H&A 672. 7. East 359. East & C. 334. 1. Tya 131. Chit 88.

So of Indorsee, if a valuable consideration passed from him at the time of taking the bill Chit 88.

Drawee's having informed the Drawer, beforehand, that it is before presentmt for acceptance, that he had not honour it, is no excuse for omitting the Notice, 3. Burn 1356. Doug 637. Chit 232. Chit 68. 89. 202. 2. H&A 336. 612. 7. Esp 392. 515. 1. Tya & 40612. 285. 5 Do 239. 1. Boss and P 652.

* Drawer's having no effects in Drawee's hands, affords a presumption, that the former has sustained no damage by want of notice. But this presumption may be rebutted by proof of actual damage. Chit 89. 7. 2 T&A 713. 1. Do 714. Tya 13. to 16. Rea Evi 203 Contra note. +

Impossible +

If Drawer or Indorsee is a bankrupt at the time of drawee's refusal to accept, or pay, notice of the refusal is unnecessary Chit 89. Chit 1.

To neglect of seasonable notice by the death or sudden illness of the Holder, Given as soon as possible after the impediment removed Chit 89. Path 144

If Drawee makes a conditional acceptance, the terms of which are complied with, by the holder, for it becomes ipso facto absolute. As to pay if the holder will engage to indemnify Chit 91. 101. Boyle 71.
Quere Suppose, the compliance to take place at a subsequent period.

If the drawee accept for part only, the Prior parties are bound, to the extent of that acceptance without notice, but must give notice of non acceptance to have the prior parties holden for the amount of the Bill Chit 90. For the acceptance to the extent is absolute, Otherwise as to the residue, as to that it is dishonoured, Chit 91.

The manner of giving notice, that a bill is dishonoured is different in the case of an Inland, and Foreign bill. In the latter no particular form is necessary. Chit 90. 1 St R 170. 1 Ryd 136. 42.

In the case of a foreign bill, Protest must be made, when notice is necessary. This is not ever supplied by the oath of witnesses or any other evi whatever. Chit 90. 1. Ryd 136. Mor 16. La Ray 493. 6 Mod 5. 2 St R 713. 5 Do 239.

Non Acceptance & Protest

The Protest is in general to made by a Notary Public who is an officer known throughout America and recognized by all nations as an officer of the Law Merchant. Chit 90. 1. 1. Show 164, Malory B. C. 10. 17. Schiner 172

After refusal, presentment is to be made by the Notary Public and if drawer still refuses, the bill is to be noted for Nonacceptance. A formal Declaration, is then to be drawn on the bill, if to be had, if not on a Copy, called a Protest. Chit 128. Ryd 136. Chit 90. Path 134. Marsh 18. Full credit is given to the Protest in all foreign courts or Countries. Chit 91. Mallory 281. Schin 172.

Notice is only preliminary to protest, but does not supply its place. Chit 91. 2 P. 473. 1. Do 175. Ryd 137.

The Protest must be made by the Notary Public himself, and not his clerk, Chit 91. Chit 137. 4 P. 175.

If a Notary cannot be obtained, the bill may be protested in Engl by any substantial Person of the place, where dishonored, in the presence of two or more witnesses, in the regular hours of business, or at at least between the hours of Sunrise and sunset Chit 91. 95. 1. Ryd 137. 143.

The form of it must conform to the Custom of the place, where it is made. Chit 92. 152. 162. 1. Path 155.

It is to be made, in general, where the bill is dishonored. But if the bill is directed to one in A. to be paid in B. the protest may be made in either place. Chit 92. Path 155. Marsh 107. or 137.

A Copy of the bill is annexed to the Protest, ut Supra, but a copy of the protest need not accompany the notice of non acceptance, tho' notice of the protest must be given. (Path Contra) for the Rule Chit 92. 6. 2 P. 567. 1. Esp 511. 12. Mod 307. Bull 271. Marsh 68. 86. 7. It is not necessary to send the protested bill.

Upon non acceptance of an Inland bill, no protest

is necessary to subject the prior parties, any act
evinced drawn's refusal to comply with the request,
is an nonacceptance. Chit 93. 6. Mod 80. 1. Patk 69. 161

It is said in 1. The 169. that the notice must ex-
press holder's intention not to give credit. This
I G. thinks is unnecessary. Chit 93. 7. 8. Contra.

A Common Law Inland bills need not be protested
but by Stat 3. and 4. Anne Protest is required for the
purpose of entitling the holder to costs, interest, damages.
Chit 93. 4. Str 910. By whom made, see Chit 93. 4,
Str 910. as in foreign bills, not necessary, to entitle
the holder to the amount of the bill, therefore seldom
made, 1. Kyd 150.

And notice of nonacceptance must be given as
well in the case of an Inland bill as that of a foreign
Bill. Chit 95. Kyd 150.

In either case of a foreign or an inland bill,
notice sent by the Mail, is sufficient, tho' the letter
shd miscarry. 2. HBl 509. Benbet 199. Chit 95. 1. P. B
509. Palm 194. Contra Both 48.

When there is no mail, sending by the first and
ordinary conveyance. Chit 95. 2. HBl 568.

It in the case of Foreign bills, protest must be made
within the usual hours of business, on the day of
refusal. Delay is only excused by inevitable accident
as death, sickness, robbing or such like cause. Chit
93. 6. 162. 4. Str 174. La Raynd 743. Mark 112. Will
27. Both 144. Notice of nonacceptance and in case
of foreign bills, protest, must be sent within a reason-
able time, to the other party or to all the parties,
to whom the holder intends to resort, (within 2
months was formerly held sufficient) He can call
only those who have received notice, the others

discharged. Chit 96.9. 2. HBL 569. Bull 271. Ryd 126.9. Shaw 318. 1. Mod 27. 2. Wood 15. Lamb 152

It shd be given on the day of nonacceptance, if there is a post or ordinary conveyance. SR 168. Chit 96.7. 4 SR 174. Ld Ray 743. Str 829. 1. Ryd 126.9. Doug 197. 2 HBL 565.

If such prior parties reside in the place where acceptance is refused, notice shd if possible be given on the same day of refusal: to the parties at a distance, as soon as possible. Chit 97. Ryd 120. 6. 1. SR 169.

It has been held, that the notice required must come from holder. Contradicted by Ld Kenyon, in 1798. and that notice by drawee was sufficient, that notice by one party ^{having} bearing a right of action on the bill, may inure to the benefit of the other parties who may have claims upon those standing before them and make further notice unnecessary. Notice to Second Indorsee will operate in favour of the first. Chit 98. Boyle 83. 1. Str 107. or 67. 1. Keil 126.

It is expedient, however for each party, after the Drawer to give notice for himself

When notice is necessary at all, it is necessary to be given to all the prior parties, to whom the holder intends in any event to resort for payment. Tho special cases may dispense with notice to some particular persons, it is equally necessary to give notice to others. Chit 98.9. 1. SR 712. Plea 202. Boyle 175. Peak evi 221.

The want of notice to the drawer is no defence for the Indorser, tho formerly thought otherwise. Ld Ray 443. Salk 131. 3. Chit 79. 203. Str 441. Thus contra

153.
It indorsing is equivalent to drawing a new bill as between the Indorser and subsequent parties. 2 Burr 669 1 Esp 334. N.

The consequence of not giving notice of non acceptance may be waived by matter of ex post facto!

Thus payment of part by a prior party amounts to a waiver of his privilege arising from want of notice and admits his liability. So also a promise to pay the whole. Chit 132 132. 133. 158. Str 1246. 2 TR 713. Bull 276. Pea 202. 1. Esp & 77. 57.

Otherwise if a promise was made without a promise knowledge of nonacceptance. Chit 102. 5 Burr 2676. Doug 658 1 TR 412. 712.

But this doctrine has been overruled and it has been resolved that such promise implies, that due notice has been given and will support the averment if it is in the declaration. 1. Esp & 334 1. Bann P 326. 2 East 469. 7. ibid 231. 236. 271.

And it has been holden by Lord Kenyon, that a prior party without knowledge of the legal consequences of the holder's neglect, does not bind. As when the holder gave time to the acceptor and Def. was notified of the fact. Chit 102. 3. n. 158. Doug 404 654. It was said in the same case, that drawer having paid the bill under such promise may recover back the amount from the holder. I Goula disagrees. Chit 102. 3. 158.

Suppose in this case the Promisee had sustained no actual damage for want of notice wd the action lie. Chit 102. 2. 3. Bl. 370. 824. 1. TR 370. 824. 288. 3 Burr 1332. Doug 637.

In case of conditional acceptance, want of notice is cured by completion (or performance of the condition before the bill becomes payable. For then acceptance becomes absolute Chit 23 or 8. 103. 132. 163. 180. 209. 80. 101. 2. Hy 152.

Boyle 72. Stra 74. 1. TR 182. Cow 57.

When a foreign bill is protested for nonacceptance, it may be accepted after protest.

Acceptance Supra Protest. The Drawee himself may thus accept for the honour of the Drawer or any Indorser. Chit 103 Beaves 33. 34.

This is usually the case when the bill is drawn on the account of some third person, and drawee unwilling to accept on his account accepts for the honor of Drawer Chit 103. Tyd 152. 1. Pow. C. 139. 1. P. B. 269.

So if unwilling to accept on drawer's account, may accept for the honor of the Indorser, in which case, he shd immediately send the Protest, to the Indorser, for the Acceptor in the usual way can only have a remedy against the Drawee. Chit 103 1. Bow Cort 131.

This mode of acceptance operates to rebut the presumption that Drawee has drawer's effects, which would otherwise arise. Chit 209. 10. Beaves 455.

The effect of such an acceptance is, to give the Acceptor a right of indemnity, on the bill against the party, for whose honour he accepts, and against all the parties before him, that is, all the parties previous to the person, for whose honor he accepts, Chit 104. Marsh 125. Cath 129. Tyd 153. 1. Pow. 139. Str R 896.

according to the tenor

Whereas a simple acceptance gives no right except against the Drawer, or him on whose account the bill is drawn. Ut Supra.

If the Drawee, refuses to accept at all any body may accept for the honor of the Drawer, Ut Supra.

Acceptance for the honor of the bill is the same, as for the honor of the Drawer. Chit 104. 105. Tyd 153.

and a bill previously accepted after protest by one party or person, may be accepted by another for a different party. Chit 104.

It is said, that Holder is bound ^{to receive} an acceptance, when offered by a responsible person, it being under protest not affecting him, unless he has orders from the party remitting it to him not to receive such acceptance. I.C. says it is unreasonable, for it is a breach of the implied warranty, that the Drawer shd accept it Chit 104. Beawes 26. 27. Tya 155. 12. Mod 410. Tya 65.

But this seems not to be law, for it has been decided that the holder is not bound to receive such an acceptance in any case Chit 104. 12. Mod 410. Tya 155. 65.

If after an acceptance Supra Protest, a third person, the drawee himself shd become willing to accept, the Acceptor supra protest may with the consent of the holder, permit it, but not otherwise: for such acceptance is as irrevocable as any. and such acceptor having made himself liable, can't be discharged without consent of the holder Beawes 457. Tya 154. 153. Chit 105.

It is said, that the holder shd have the bill protested before he receives the acceptance for the honor of a party, for otherwise it is said that the Drawer might allege that the Acceptor was not ^{the} person on whom the bill was drawn. But I apprehend, this holds only as to foreign bills, it being unnecessary to protest Inland bills for the purpose of creating a liability. Chit 105. Marsh 88. 125. 7.

Mode of Acceptance. Supra Protest.

Acceptor goes before a Notary Public and declares in presence of witnesses, that he accepts the bill in honor of Drawer or Indorser, and that he will satisfy it according to its terms.

Then ~~then~~ subscribing it thus, "Accepted Supra protest in honor of Ab. or C. & Co. It is usual to name him for whom it is accepted, but it seems "accepted" alone is sufficient.

Chit 105. 5. Tya 153.

Such acceptance however is as binding on the Acceptor as if there had been no protest. It varies his rights as between himself and the prior parties, but not his liability as to the holder and all subsequent parties. For he is liable to them at any rate. Beaves 35. 45. La Hay 575. 12. Mod 410. C. R. 76. 3. Burr 1672. 4. Chitt 105.

If one accepts for the honor of the bill, which is in effect for the honor of the Drawer, he is liable to all the indorsers as well as the holder. He is liable to all the subsequent parties to the drawer, for as to such parties, he assumes the liability to which the drawer was subjected by the protest. But he is not liable to the drawer. 1. Esp 113. Beaves 457. Tya 153. Chitt 105. 8.

If he accepts for the honor of a particular Indorser, he is liable to all the subsequent Indorsers, but ^{not} to him for whose honor he accepts, nor to any prior Indorser, nor to the drawer. The extent of his liability is the same, as that of the party for whom he accepts. Beaves 57. Tya 153. Chitt 105. Esp 113.

Such an acceptor has also a right of indemnity vs those for whose honor he accepts, and all prior parties. If then he sustain any damage, as if he is compelled to pay the bill, he has also a remedy vs all such persons. Beaves 47. 1. T. B. 139. 1. Esp 113. Tya 155. Chitt 104. or 64. 115. Poth 17. 1. Bou 139.

Indeed an Acceptor *Supra* Protest, stands as to the party for whom he accepts and all the prior parties, in the place of Indorsee. He ultimately becomes the holder of the bill.

That is, upon the supposition he pays it, and the presumption is, he will pay it. This is obvious, if you regard the structure and effect of the transaction. As bill drawn upon A and payable to B. B indorsers it to C. C offers it for acceptance to A. he refuses, and ² accepts for the honor of ^B the indorser, D pays the bill. Now D was a stranger but by paying amount to the Indorsee, he becomes virtually a purchaser of the

Bill. I G. says perhaps it wd be more proper to say surety or
warrantee.

The rights of an Acceptor *Supra* Protest are the
reverse of his duties and he subjects himself to such, as the
person for whose honor he accepted, was subjected, and
has the same remedy as the person for whom he accepted.
and also a remedy vs that person.

Transfer and Negotiation of Bills.

Bills which are negotiable at all are so "in infinitum"
This is the case with Bills of Exchange and Bankers Checks,
Formerly holden, that bills payable to, or Bearer were not
negotiable but it was long since settled otherwise. Chit 117
3. 107. 3. Burr 1517. 27. Eyd 63. 5. 3. Wils 211. 10th 111. 2. La Ray 150. 3
Ser 299. Salk 125. 2 Bla 464.

When a bill is not negotiable a transfer will operate vs
the party making it, as if it were negotiable, that is, it will
subject him to the amount of the bill, if the person to whom
he transfers it can't recover of the drawer, or person on
whom it is drawn. For tho choses in action at C^t, are not
negotiable so that the Assignee can maintain an action
on them in his own name vs the original party, yet they
were so far transferable, as that the Assignee may have
an action on the implied covenant vs the Assignor. As to
promissory Note not negotiable. Salk 125. 7. 33. Holt 117. Burr
1226. 2. Atkins 442.

The question whether a given bill, is, or is not negotiable
is a question of Law for the Ct to determine. It is said,
indeed as to new cases 1st. where the doctrine is not settled,
that the custom of merchants may enquired into. There is
no doubt a merchant may be examined to tell what
he knows of a particular custom, &c used by Merchants.
But he is introduced as a book on that subject, wd
be, or for the same purpose that we wd consult a Dict-
ionary Not used I trust, for the purpose of enabling

the jury to find the particular custom and thereby enabling the Ct to make an application of the Law to that finding. but to give information to the Judges. 2. Burr. 1216. 1. B.R. 295. Doug 603. Wats 253. ²33. Chit 109. 28.

It is a general Rule that a valid transfer can be made only by the Payee or one having the legal interest in the bill, Hence an indorsement by one not having the legal interest, does not transfer the interest. If a bill is drawn payable to A B, and C indorses it over to D. Here C is a stranger and can't transfer the interest to D. for he himself has none.

And if a bill is made payable to A B, and another person of the name of D A B. shd indorse it, this ^{also} pass an interest to Indorsee for Indorser had none. 4. T.R. 28. 126. 1. H.B. 607.

But the indorser will be bound, tho' not the other parties, For it amounts to a new Bill Chit. 121. 2. 10. 12.

When a bill is made payable to bearer, it may be transferred without indorsement, by mere manual delivery. By the terms of the bill, an interest will pass with indorsement, and in this case if it is transferred by a person who is not the owner of it, such transfer will not subject the prior parties, ^{provided} the person to whom transferred knew the want of title in the transferee.

But if he was ignorant of this, he can recover of the prior parties, for here is a bill payable to bearer and a bearer has passed it to him, & more he not allowed to recover of the prior parties, the credit of these bills wd be impaired, and their circulation prevented.

The Rule holds the same as to a bill payable to order which has been indorsed in Blank by Payee. There no need of an indorsement in such cases, it will pass by mere manual delivery, for any holder has a right to fill up the blank with his own name. The person

100

who thus puts his name on the bill holds out a credit to any one who will receive it. and therefore the holder may fill up the back with his own name. Indeed the bill may run the gauntlet over the whole world by mere manual delivery and the ultimate holder may then resort to the prior parties by filling 3 Burr 1516. 1. Wils 752 1. Blk 485. Doug 611. 53. La Raymo 738. Chit 451. 100. 21. 201. 4. Ky 102 7. TR 427.

If a feme sole being Payee or holder, marries, the right of transfer belongs to the Husband. She has become legally incapable of endorsing it. Strong & 516. 3 Wils 53. 11. Moa 246. Chit 110. Ky 107.

A valid transfer may be made after the time of payment, for he who makes it, can't object to the time. La Ray 571. 5. 1. TR 430. 3. Burrough 1510. 3 TR 80. It is his own act. Chit 114. 15.

But he who receives such transfer, runs the risk, of any equitable defence existing between the prior parties. As if the Blx was drawn without consideration and he sue drawer, this fact may be shown. 7 TR 429. 1. Wils 230 3 TR 83.

If a bill of exchange is endorsed after it has been paid, the indorsmt binds only him who makes it, and not the prior parties. IE if payment is made at the regular time or at some subsequent time. For payment had been made before the time appointed for payment, the parties wd not be discharged. 1. Blk 89. 1. Wils 46. 4 TR 470. Chit 115. 176.

And a bill paid in part may be endorsed over for the residue, it is then a Blx for the amount unpaid La Ray 360. Curch 466. 12. Mod 213. 1. Patk 65. 2 Wils 262. Chit 115. 121.

The mode of transfer is governed by the legal operation of the instrmt and usually by the terms. but not always. For the terms and legal operation are not always the same. Hence a Blx payable to fictitious payee

person is transferable by bare delivery, as one payable to bearer: and even if it were endorsed, it wd be negotiable. 1. H. R. 600. Chit 115. 16.

And where there is no fictitious party in the case, there are two cases where the Bill is transferable by mere delivery 1. where it is payable to bearer. 2. where it is endorsed in blank, when payable to order. for any holder may fill up the Blank, and make it payable to himself. he then becomes indorser. Strang 557. 1. Burr 452. 3 Do 1516. Hyd 88. 4 Esp 210. 1. And 180.

To formal words are necessary to make a valid indorsment. It is sufficient that indorser's name be written on the back, and if there be nothing else, it is a blank indorsment. Com Rep 311. Talk 128. 6. 30.

And indorsment may be in blank, in full or restrictive. 1. Blank indorsment consists in the mere name of Indorser, and where the indorsment is intended to transfer the interest, this is the usual mode. Hyd 89. 117. It is sometimes used to empower an agent

But a blank indorsment, while it remains so, is of no account, it does not "Per se" transfer the interest. It only enables the holder to fill it up, payable to himself. The form of filling up, is the shortest, possible, "Pay to P or order," It is done often at the moment of trial. Talk 126. 8. 30. 2d Ray 871. 1. Bl R 297. Com R 311. Chit 25. 56. Hyd 95. 6. 95. 6.

Hence while the indorsment remains in blank, an action may be bro't in the name of indorser, the title is yet in him. Contra where indorsment is in full. 2d Ray. 871. Bull 272. 12. Mod. 193. 244

And such indorsee may be witness for Indorser. Talk 112.

A blank indorsment by Payee makes the bill transferable by delivery. Any one of the holders may fill

the blank with an assignment to himself the Indorsee. 171.
Chit 118. Doug 496. 636. Hyd 89. 205. 6.

Nor can its negotiability, the indorsmt remaining in blank, be restrained by any subsequent indorsmt in full transferring the interest. Nor the holder may strike out the latter and file up the former to himself. When is it necessary to strike out the former! Chit 118. 9. 20. 1 Hyd 205. 6. 1 Esp 181. 4 Do 210. Pea Rb 225. Doug 633. Holt 296.

And if Payee makes indorsmt in full. a blank indorsmt by Indorsee will make it negotiable from him by delivery. Boke 151. 7. 1. Esp 182. Chit 118.

But a bill payable to order, is not negotiable at all by mere delivery, unless indorsed in blank by Payee or Indorsee and is not negotiable at all without indorsmt of some kind by Payee, for the holder can't in such case shew a title by which he may sue against transferee. Chit 116. 7. Mod 87. Hyd 88. 9. 1. Pea Rb 606. Doug 611. 609.

An indorsmt in full is one expressing to whom it is made. As "Pay the amount to A." Chit 118. Hyd 89.

It contains in itself a transfer of the instrument to the person named. Chit 118. 9. Poth 21. 2. 3. 4.

It makes a bill further negotiable in the first instance only by Indorsee's indorsmt, tho' if he makes a blank indorsmt, it is afterwards transferable by delivery. Chit 118. Boyle 158. 1. Esp 182.

The negotiability of a bill originally negotiable, can't be restrained even by Payee or special indorsee, but by express words of restriction. The omission of the words, "or order" does not restrain its negotiability.

And if Payee indorses in blank, and it remains so, it can in no way be restrained by subsequent indorsmt.

12
transferring the interest Chit. 119. 20. Com. R. 311. 1. Alk. 290.
Doug. 617. or 37. 2 Burr 1216, Stra 557. Teld 126. cases.

A restrictive Indorsmt is one restraining in express words the negotiability of the bill as "Pay to A only" "Pay to A for my use" The effect is to stop the currency of the Bill Chit 119. 20. 2oth 168. Harsh 72. Doug 617. or 637.

Payee or Indorsee having the absolute property may limit the paymt to whom he pleases and thus stop its currency, once thought otherwise. Chit 119. 2. Burr 1226 1. Alk. 299. 1. Atkins 249. 1. Shaw 163. 4 T.R. 28. 119. So if he transferred the interest. As "Pay to A for my use." A can't negotiate even by filling up ^{with} blank indorsmt. For it appears, he has no interest in it.

Otherwise I conclude, if the Indorsmt tho' restrictive transferred the interest and if there was a former indorsmt in blank. As Indorsmt by Payee, in blank, by Indorsee Pay it to A only. - A may negotiate by delivery, for the blank may be filled up by any holder to himself =

A transfer, it is said, can't be made after acceptance for less than the amount due on the Bill, for it wd subject the acceptor to two actions, whereas by his implied contract he intends to subject himself to one only. Quere, will not an indorsmt for part bind the Indorser? P. Q. thinks it will. Chit 120. La Ray 360. Carth R. 480. 12. Mod. 213. Talk 65. 1. Hyd 109.

But if endorsed for part only, before acceptance the acceptor is liable to Indorsee This acceptance implies an engagement to pay the bill according to ^{the} Indorsmt, Chit 120. Beaves 266.

The Drawer, it seems, can never be never be subjected by such Indorsmt unless it be made before the bill is drawn. La Ray 640. Talk 65. Carth 466. 105. 109.

But after paymt of part it may be endorsed for the

173
residue, for there is no twofold obligation. Chit 120. 2 Mils
262. Talk 65. La Ray 360.

To complete a transfer, the bill
must be delivered to the assignee or transferee Chit 115. 21. 61.

The transfer of a bill is similar in legal effect, to the
making of a new bill & the Indorsee is in almost every respect
as a new drawer or original drawer. Str 478. Chit 121, 163,
170. 187. 1. Burr 614. 3 Talk 68. 2 Show 441. 95. 501.

On this principle, it is said, a promissory note may be
declared on as a Biloc. Indorsee being considered as
drawer of a new bill. Chit 121. 170. 4. FR 149. 6. Mod 29. 30.
La Ray 743. 1. Talk 132. 2.

Hence also the obligation to which indorsmt subjects
the Indorser in favour of Indorsee, is the same as that
of drawer to Payee, and this obligation may be discharged
by indorsee's neglect or otherwise, as may that of drawer
to payee, So by paymt made by another party, there is
the strictest analogy between them. Chit 122. 115. 24. 1 Mils
46. 1. FR 89.

* Transfer by bare delivery if made for an antecedent
debt or for valuable consideration passing at the time,
as for goods sold, subjects the party making it in
favour of his immediate Assignee, to an obligation sim-
-ilar to that created by Indorsmt. La Ray 928. 12. Mod
244. 521. 6 FR 52. Chit 122. 200. Contra opinions, but
not law. Hyd 91. 90. Talk 124. + Incorrect. I G says +

Exception. If it is expressly agreed at the time, that
the assignee shall take the bill as paymt and run the
risk. And not otherwise and a receipt in full is not
evidence of such agreemt. Chit 123. 4. 8. FR 65. 6. Holt 121.

If not thus agreed, and drawee fails to pay it, the ass-
ignee may recover of Assignor on the consideration of the

transfer as for the goods sold. But not on the bill. Chit 123. 180. 7. 5 R 65.6. La Ray 928. Tyd 90.1. 10. East 7.

But as the name of the Assignor is not on the bill, he is not a party to the instrument. There is no privity of contract between him and a subsequent assignee, therefore no action lies against him except by his immediate Assignee. Chit 123 80. 3 R 174.76 La Ray 928. Carth 270. 3 Burr 1528. Esp 61. 1. How 130.

Exception also, if the transfer is a discount, that is, by way of sale, It is then like the sale of any other article, For in such cases there is no distinct ground of action, as in the case of goods sold on a prior debt. Here there is no implied warranty. Chit 63. 109. 123. 63 3. R 750 1. Esp R 447. Tyd 90.1.

Assignor is discharged by paymt made by a mother party. Chit 115.24. 1. Mil 46. 1. HBL 89.

But the taking of one of the parties in Execution, does not discharge the other. So if the Holder discharges one from prison, it is not a discharge to the other. So also a discharge of one party under an act of insolvency, the other is still holder, for their liability is distinct and independent Chit 124 155. 2. HBL 1235 4 R 185. 825. 2 How 181. 494 La Ray 690. Salk 574 3. Mod 87. Pelw 838. 882.

If the holder of a bill transferable by delivery ~~loses~~ loses it, or is robbed of it, and it comes into the hands of one ignorant of the fact for good consideration and before it is due, he may recover upon it as against the prior parties, otherwise if he takes it after it is due.

Doug 611. or 33. Chit 110. 124. 150 1. Burr 452. 1516. 2. R 70. 7. R 427. La Ray 190. Salk 126. 3. Do 71. 7. Mod 47.

And if the holder has not given good consideration for it and the drawee not having notice of its loss

pays it, he is not bound to pay it again, to the true owner.
 Chit 125. 150. 1. To 607. 4 To 28.

But if a lost bill is paid out of the usual course of business to holder, Drawee may be compelled to pay it again to the loser, as banker's check paid the day before its true date or before due. Paymt before due will not discharge the drawer until made to the true owner. Chit 125. 150. 1. Exp to 40159

If a bill transferable by indorsmt only, is transferred by a forged indorsmt, the holder acquires no interest in it. Hence the original holder may recover against the drawer or acceptor, tho' he had paid it before to the holder under the forged indorsmt. Chit 125. 6. 151. 1. To 607. 4 To 28.
 Doug 617. 637.

If the Drawer of a foreign bill accepted or not) loses it or delivers it to the wrong person, he must give the Payee his promissory note for the amount payable at the time, the bill was. If he refuse, protest must be made for nonacceptance and afterwards for nonpayment. Drawee then becomes liable to an action. This is a Rule of Public Law, not known at the C. L. as to Inland bills of Exchange. Chit 128. Marsh 121. Bull 271. Chit 127. 8.

In all cases of a bill lost, if a new one can't be obtained. Protest may be made on a copy. Chit 89. 90. 128. 1. Shaw 163.

If drawee absconds after acceptance, the holder may protest it for better security and give notice of the absconding. Chit 128. 9. La Ray 74. Marsh 27. 111.

The security is given by a third person engaging under the Protest to be bound as Principal for the payment. Chit 129. Marsh 28. Com L. Mer. F. 8

Presentment for Payment.

The general rule is, that the holder must present the bill for payment at the time when due, if the time

is appointed, & if not within a reasonable time: and this whether accepted or not, otherwise he loses remedy vs Drawers and Indorsers. Bull 669. Chit 130. 1. 202. Poth 121. 7. T.R. 580. Salk 127. Strong 1087. Bull 470. 2 Bl. 117. 1. Hyd 120.

Former distinctions between a bill given in payment of a prior debt and one contracted at the time of giving the bill, now excluded. Chit 132. 6. 18. Mod 203. 408. Holt 299. Salk 1214. 1. Hill 7. Hyd 17.

If Acceptor or Drawer is dead, presentmt is to be made to his executor or Administrator, if any, if not, at the house of the deceased. Chit 136. 2. Marsh 135. Mallory B. 2. C. 10.

If the holder is dead, his executor or Ad^m is to present for paymt and it is said, the Ex^r shd do it, tho the will was not proved. Chit 7. 132. Marsh 135.

The acceptor himself can't defend on the ground of delay in presenting for paymt, or of an indulgence to any of the parties, he being first liable no injury is done to him. Chit 133. 567. Doug 235. 247. 1. Esp. R. 46.

It is said an action lies vs acceptor without presentmt for paymt, the action being a sufficient demand. Chit 133. 10. Mod 38. Boyle 78. Do 188. Note A. These as the Acceptor may not know who the holder is, or where to find him to make tender. I G. thinks the Rule on this ground, very questionable. Str 222. Chit 133. Poth 140. Mar 88. Marsh 98.

In foreign bills if the course of exchange has altered that is after acceptance, I suppose, the Acceptor is to pay at the rate of it, when the bill falls due. Chit 133. Poth 174.

Of the acceptor engaged to pay on or after demand, he may clearly insist on the want of presentmt. Chit 134. 2 Thom 236.

If he appoints paymt to be made by another person, as by his banker, he as well as other parties, is "prima facie" entitled to insist on the want of presentmt there, otherwise if the Banker is proved to have had none of his effects. Chit 85. 6. 134. 5. Str 1195. Boyle 78. 2 HBl 509.

Presentmt is to be made by the holder or his agent, being competent to give legal acquital. Say's Chitty. 134. Duer Chit 157. Pea 179. 180. La Ray 742. ^{nee} Chit 134. Poth 129. 1. Esp 115. 1. HBl 167. 10. Mod 286.

And in general to the Drawee, not always. Sufficient if presented at Acceptors house, if he is not there, or at the place appointed for paymt. Chit 134. 5. 1. Esp 512. 2. HBl 509. 10. Mod. 241. Marsh 1062.

If the place appointed, is at the holders house, inspection of the holders ^{books} a sufficient demand. 2. HBl. 509. Chit 135.

If the acceptor has removed the holder shd enquire as to the place, and if he succeeds in discovering it, present there, otherwise if he has absconded, then no demand is necessary. If he has left the Kingdom, presentmt at his house is sufficient. Chit 70. 126. Strange 1087. Boyle 58. La Ray 734. 1. Esp 512. Hyda 125. 6. 7.

No demand on Drawer is necessary to subject the Indorser. 2 Burr 609. La Ray 443. Chit 136. Stra 441.

Time of Presentment.
Where the bill is payable a certain time after date, or at usance, depend on the appointment made in this respect in the instrument. Chit 136.

When the time is not expressed, depends on the circumstances of the case, as Distance, Chit 136. 7. 40.

In the former case, the bill is not payable at the time mentioned, days of Grace, being allowed.

In the latter when the bill is payable at sight, it is said, the days of Grace are not allowed, As to this, the authorities disagree. It is decided in New York, that days of grace are to be allowed, 2. Cases Cases 195. 4 J.R. 170. Poth 145. Contra Johns Cases 328. 2. Caines 195. 343. Chit 137. 140. 6. 4. Gal 147. Poth R. 172 198. Bea 172. 256. 1. Show 103. Rya 10. Boyle 63. 23. 8.

In such case it is to be presented within a reasonable time. Chit 146. Str 308. 2. Freeman 247.

If a bill payable at a place using one chronological style, pay on a day certain, at a place using another the time of payment is ascertained by the style of the latter place. This is according to the Lex Loci, Chit, 59. 60. 4. 83. 138. Poth 155. Boyle 68. Bea 251. Marsh 102. Contra. Rya

8. If drawn payable at a certain time after date or after sight or at usance, The day of date in our case, & of payment in the other, is excluded, Chit 138. 143. Lord R 280 B 303. Poth 13. 13. 6. J.R. 212. Contra Foster case or Fortüne 376.

The gen Rule of C.L. in other cases, is different as in bonds, Covenant, 2 Vern 305. 10. 3. Poth 623. Cam 714.

If a bill payable at a time fixed after date, has no date, the time is computed from the day on which it issued, exclusively, that begins with the next day. Chit 129. 143. Boyle 88. La Ray 157. 6. 4. Poth 337. Com & Hait B 3. See ab Title lease.

Days of Grace allowed to drawee, probably, so-called, because originally gratuitous. that is, the indulgence was. Tho' it is now a matter of right. Chit 139. 143. 4 J.R. 151. 2 Rya 9. 10. 121. 5. 1. Esp R 59. 261.

This number is different in different places, according to the custom of the Country. In England and U.S. it is 3 days. Chit 190. Bea Pl 260. Marsh 94. Rya 9. 10.

Days of grace are computed according to the custom of the place, where the bill is payable, as if the Bill is drawn where it is 3, and payable where it 5, the acceptor has five. Chit 140.

Bills are to be presented for payment on the last day of grace, in Eng and U.S. Sundays, and holidays are included in the computation. I suppose, only religious festivals are meant by holidays as fasts &c. Chit 143. 4. Polk 139.

Hence if the last day of Grace is a Sunday or a great Holyday, demand shd be made on the second day of grace, and if not paid then, is dishonored. Id Ray 143. Chit 141. Marsh 95.6. Star 829. Ryd 120.

In other cases, presentment before the last day, is a mere nullity. Chit 143. 1. Esp 261. 0.

A bill that is paid before the last day of grace, is out of the ordinary course of business and consequently liable to many objections Vide ante Page.

Usance, is the ordinary, usual, customary time applied by usage for the payment, as between the countries between which bills are drawn. Chit 141. Ryd 4.

Foreign bills are usually drawn at one usance, The length of the usance differs in different countries. Ryd 4. If the bill is payable, a month or months after sight, the computation is by the Calendar months.

Otherwise as to other instruments in general, L.B.C. 141.

2 Esp 333

If a bill is payable at fixed period after sight, the time is computed ~~at~~ ^{from} the time of acceptance or protest for nonacceptance. The computation commences the next day. Chit 144. 6. Polk 212. Com D. N. F. 7.

When no certain time of payment is expressed, presentment must be made within a reasonable time as when payable

50
at demand or at sight Chit 136.7. 146. 2. Tra 247. 257.
Tra 415. 508. 1. R 168. Syd 45. 1. R 168. or 108. Boyle
65. Doug 512. 2. H R 568.9 Show 910. 1175. 1248.

The day of paymt being ascertained, presentmt
must be made within a reasonable time before the
expiration of the day in the usual hours of business.
Chit 67. 148. Boyle 67. 59. Syd 125.

On Presentmt for paymt the bill should not be
left with the drawee unless paid; If it is, presentmt
is not considered as made, till the Bill is called for
Chit 149. R 416. 910.

Payment shd in general be made only to the party
owning the bill or at his request. Therefore if ~~made~~ made
to Payee after he has transferred the bill, it will not
avail the party paying it. R 169. Chit 149.

If payable to A or order, for the use of B. paymt
shd be made to A or order. Chit 112. 149. 152. Carth 5. Ben
310. Syd 107. 8.

It is said to be a general Rule, that when
money is payable on a day certain, the party bound, is
allowed the last minute of the day, to pay it in. - this
respects Inland bills of exchange. Chit 96.7. 163. Syd 121.
4 R 174. I Could think doubtful --

Otherwise as to foreign bills, for as the protest
is to be made on the last day of Grace, and to be sent, if
possible on that day, holder must insist on paymt ~~as~~
within the hours of business. Chit 96.7. 163. Syd 121. 4 R
174.

But in case of Inland bills, as the reason of the
last rule don't apply to this" it seems, the acceptor
may be indulged till the last moment of the day, of
paymt. Chit 147. 162. Boyle 67. R 140. Contra Syd 121.
4 R. 174:190 R 140.

If a bill is drawn here payable in a foreign country and in foreign coin, coin, the value of which is afterwards, reduced, it is to be paid ^{paid} according to the value at the time of drawing. Skin 272. Chit 154. This is different from the case where the course of exchange varies. Vide ante Page

If the holder compound with the Acceptor, without the consent of the other parties, they are discharged, for he deprives them of their remedy vs the Acceptor. Chit 155. 183. Cook. B. L 160. Chit 163.

Otherwise if he only receives a dividend, the acceptor being bankrupt, it is advantageous to the other parties, But he must give notice of nonpayment. Chit 155.

x It is said, that if the holder receives of the Acceptor, less than the sum due, in part satisfaction, without their the consent, of the other parties, they are discharged, because it shows an election to have the money of the Acceptor, + La Ray 744. Str 745. Bull 273. Contra Bull 271. 3. 5. Marsh 83. Chit 156. 160. Cook. B. L 167 Chit 84. 133 Marsh 68. 85. 88. Chit 84. 133. 157 Cook 70. Quere if due notice is given? All the first part incorrect I G.

It said, to be doubtful whether a party bound can insist on a receipt, as a condition of payment, See title Sender. Chit 134. 151. Pea 179. 80. La Ray 742. Contra Pea 179. 80. 2 HBl 31. 1. bin 192. Fort 144 I G. thinks no receipt can be demanded of right.

A gen receipt indorsed is prima facie evi, that the payment was made by the acceptor, therefore if paid by drawer or Indorser, the receipt should for his security, be in his name. Chit. 151. 8. 209 Pea R 25.

Otherwise he discharges the other parties, This is merely to avoid the presumption, for on a general receipt, parol testimony may be read.

In certain cases, under the Stat of 8, 9 of 17th and 18th of May inland bills may be protested for the purpose of recovering interest and charges. Chit 160. 1. 155. 9. 202.

For the Rules regulating the notice, as to notice in case of nonacceptance. Vide ante and as to form of Protest, see Chit 159.

If part only is bad, the bill is to be protested, if foreign for the residue, and notice given in all cases except when excused or waived as in case of non payment, Chit 156. 169. Marsh 68. 80. 7.

The effect of protesting an inland bill under William 3^d is only to give the holder an accommodation remedy therefore it is never necessary to protest such a bill, notice without protest is sufficient. La Ray 992 Chit 101. Str 910. 2 Be 469.

Protest for non payment of a foreign bill shd be made on the day after refusal and notice be sent the earliest ordinary conveyance, Chit 95. 6. 7. 162 4 T R 168. 174. La Ray 743. Hyd 126. Str 829.

In case of an Inland bill, it seems, that protest can't be made till the day following, as the Acceptor is allowed the whole of the former day for payment. Chit 133. 163. 1. T R 168. 174. La Ray 743 4 T R 176.

It shd be given the day following or the prior parties will be discharged i.e. if the party lives in the same place, where the protest is made, but if elsewhere, as soon as possible. i.e. by the earliest ordinary conveyance. 1. T R 168. 9. Doug 515. 2. H R 555.

Paymt Supra Protest.

When a foreign or inland bill is dishonored, paymt supra protest may be made for the honor of the drawer, or Indorser. Chit 103. 13. 63 Geln. 891. 2. Marsh 128. B R 50.

But the acceptor having made a simple acceptance, cannot pay for the honor of Indorser, being as to him bound already by his previous acceptance. But if he has no effects of the drawer, he may after a simple acceptance pay for his honour, and thus acquire a remedy vs him. He wd have a remedy witht a protest. The effect of the protest is only to rebut the presumption of his having effects, and thus shift the *onus probandi*.
As to whether he has effects of the drawer, or not, I conclude Chit 105. 115. 122. 163. 4. Tyd 153. 5. 1. TRL 264. B PL 458. Selw 891. 1. Esp R 113. 1 Bos C. 139.

Generally payment shd not be thus made, till after protest for nonacceptance for nonpayment. For without protest payer has no right to recover vs any of the parties on the Bill Chit 105. 163. B PL 53. Marsh 128.

Tho' if drawee having no effects of the drawer's in his hand, pays witht protest, he may recover vs him, as for money lent, and I that a third person who has before accepted Supra Protest, may recover in the same manner vs the party for whose honor, he accepted and paid the money Chit Tydt.

And if the acceptor for the honor of the drawer or Indorser, has secured his approbation of the acceptance he may safely pay without protest for nonpayment Chit 164. B PL 48. And a stranger, as he may accept, so also he may pay for the honor of the Drawer, or Indorser Supra Protest. Thus his remedy on the bill vs the party for whose honor he accepted, and also the parties prior to the person, for whose honor he accepted, Chit 164. The Rules, that have been given apply to promissory notes, as well as Bills, unless they have been particularly excepted.

The following Rules do not apply to Bills, unless particularly mentioned—

Promissory Notes.

A promissory note is a direct engagement in writing to pay a sum of money to a person named in it, or to his order, or to bearer, in the nature of a B^le drawn by the maker upon himself. Chit 165. Syd 18. 35. 2. Bl 467.

They are not negotiable at C^L. tho' made payable to order or bearer, and they were not instruments on which actions wd lie, but were evi of a parol contract. Chit 165. 6. Syd 11. 18. Pal 129. La Ray 757. 9. 6. Mod 29. 30. 3. Bur 1520.

But such notes were put upon the same footing with Inland B^les by Stat 3ana & Anne made perpetual by 7. of Anne, that "were converted into instruments and made negotiable.

Hence the rules relating to Inland B^lills, are in gen applicable to promissory notes payable to order, or bearer, Chit 167. 9. Syd 19. Now settled, formerly held Contra that 3 days of grace are allowed, to such notes as on bills of exchange. Chit 169. 1. TRe 179. 4. Do 152. Syd 121. 25. Bull 274. Doug 61. 3.

A promissory note when indorsed resembles a bill of exch. Indorser is as Drawer, Indorsee as Payee. Makee as Drawee. Chit 121. 170. 187. 8. 3. Bur 676. Syd 345. Hence, it is said it may be declared on as B^le & TRe 149. 6. Mod 29. 30. La Ray 743. 1. Pal 132. 3. Quere except vs the Indorser!!! In N.Y. there is a Stat making promissory notes negotiable in the same manner as Inland B^les

Bankers Cash Notes. are only a species of promissory notes given by bankers. These are the notes of a private Banker. Chit 170. 1. TRe 415. 550. Heit 114. 1. Pal 282. 3. Le. 299. Not settled to be negotiable 'till the Stat of Ann. 6. Mod. 29. 30. La Ray 180. They are now considered and treated as cash, being payable on demand, being payable on demand, whether to order or bearer, and will pass in a W^ll as cash.

Chit 16. 17. 171. La Ray 744. Doug 635. 1. 5 R 423. 3. Burr 1517. 9.

185.

In general transferable by bare delivery. But if endorsed they may be declared on as Bled. vs the Indorser, Chit 171. La Ray 743. 1. Gal 132. 34. 4. 5 R 149. In other respects, governed by the same rules, as bills of exchange. Chit 171. 1. Gal 132.

Bank notes, owe their origin to the Stat incorporating Banks. Made payable on Demand, (except post notes) They are considered not as securities, or evi of a debt, but as money, They pass in a will under the name of money or cash, but they are in fact securities. Chit 171. 2. 1. Burr 458. 3. 5 R 554. 6. 5 R 335.

But an action for money had and received, will not lie vs the finder of them. Unless he has received money for them, i.e. specie, and then it lies for specie and not for the banknotes, for that action lies only for money in the strictest sense. Chit 172. Esp 99. Cow 197. 3 East 169. 2 Bl R 684. 828. 1269. 1. 5 R 239. 242. Burr. 29. 25. 89.

Not are banknotes a tender, if objected to at the time as not being money, otherwise they are. Chit 172. 3. 3. 5 R 554. 1. Equity cases. ab 318. Doug 662. 1. Bana P 525. 8.

No particular form of words is necessary to a promissory note of any kind. It is sufficient, if it contains a promise to pay money. Chit 173.

Hence a note promissory for value received, to account with A or his order, for a certain sum, operates as a promissory note. Chit 173. 5 R 629. 786. 8. Mod 362. N. a La Ray 1396. 2 Atk 32.

But the mere acknowledgment of a debt, without a promise to pay, or words amounting to a promise, does or will not operate as a promissory note, Chit 173. 1. Esp R 326. 426.

I.O.U.

As I owe A.B. tho it is prima facie evi of a debt and may be given in evi in assumpsit. This adopted in Eng to avoid the stamp duty.

They must be payable at all events in money (otherwise they are not negotiable {tho' may be declared on as a note between the original parties}. Bull 272. La Ray 67. 1362. Chit 32. 4. 172. 4 Mod 242. 8. Mod 363. For 1151. 1271. Camb 227. 4 TR 149. 5. TR 486. 7. TR 243. 733. Boyle 4. Contra 2 BlR 782. Ryd 30. (useless,) because evi of a contract, and this is aff.

The requisites are precisely the same in Promissory notes as in Bils, subject to the same limitations and qualifications. Without those requisites, it is not considered as a promissory note, but it has been holden, that it may be declared on as promissory note between the original parties or those in immediate privity, as Promisor, and Promisee or him to whom the promise is made. 7. TR 243. Chit 33. 48. A note invalid after 6 years, according Eng Stat,

Remedies on a bill or note.

Assumpsit, is the usual action on bills or notes. It is said to be the only remedy on the instrument, when there is no privity of Parties. As between the Indorsee and Acceptor or maker. Chit 179. 4 TR 471. 1. Mil 175.

The holder may in general maintain y^d action vs all the prior parties severally. Thus the action lies for Payee vs the Acceptor, Drawer, and all the Indorsers. So for assignee by delivery, but he can't maintain an action vs any person whose name is not upon the bill, except the persons from whom he last received it, and then only on the consideration, not on the bill. But they can't be joined for each prior party has an independant liability - Chit 122. 3. 180. 7. TR 64. La Ray 338. 12. Mod 244. 408. 521. For 515. 6. TR 471. Chit 180.

So by drawer vs Acceptor, in case he refuse to pay. Chit says, and so by Drawer vs drawee, on refusal to accept. But Chitty is wrong. J G says, 180. 203. 191. Chit.

18.
And in general any party having been compelled to pay may maintain an action vs the prior parties i.e. those whose names are on the bill. Chit 180. 7. TR 571. 885.8.

So may the Acceptor for the accomodation of the drawer, having none of the drawers effects, if obliged to pay, have no action vs the drawer. Chit is mistaken. Says J.P. Chit 180. 191. 203. Lyd 156, 196. 1. TR 269.

So it lies for a stranger having paid "Supra Protest" vs the party for whose honor he paid - and all the prior parties, Chit 180. Lyd 196.

If acceptor is obliged to pay witht having drawers effects, he can maintain an action vs the drawer, but not on the bill, unless he accepted Supra Protest for Drawers honor. In gen the action will not vs one who becomes a party after the holder, back

As A endorses to B, B endorses to back to A. If A shd recover vs B, B wd afterwards recover vs A. But this rule cannot hold in favour of acceptor or any of the Parties, prior to A. Chit 181, 4. TR 476.

The action lies not in favor of holder vs the party from whom the Pltff received the bill, unless he had a valuable consideration for it, as between the immediate parties, want of consideration may always be shown, but not between the other parties. (Que in N.Y.) Chit, 9. 51. 82. 181. Lyd 155. Doug 514. 1. Band C. 651. 7. TR 350. 521. 1. Nil 185. 2 Bl 446. 4. Brs Pl 604. 10. Mcd 36, Doug 514.

If the holder makes the Acceptor his Executor, and dies, the right of action vs all the parties is extinguished.

For the primary liable party being discharged, the secondary is of course. It is forgiving him the debt, a release, Besides it destroys the claims of all the other parties vs the Acceptor. Chit 181. Both Pl. 191. 1. Roll 192. Pl. 184. 2 Bl 511. 23. Do 18.

Holder may at the same time commence an action vs each of the parties who are liable on the bill. But satisfaction by one will discharge the others, i.e. of all except costs. For only one satisfaction can be had. Chit 181.2.193. 6oth Pl 100. 1. Wils 46. 4. 5th 691. Tyd 112. 116. 198. 3. Mod 86. 2. Ghov 441.494. Pkin 235.

And if in an action vs Drawer or Indorser, he will pay the amount of the bill and costs in yt action, the Ct will stay farther proceedings vs him! Secus as to the Acceptor, unless he pays the costs in all the actions as well as the amount of the bill, he being the original defaulter. Chit 143. 4. 5th 691. Str 515. Contra Tyd 198.2. Pl B 749.

The holder having received judgment vs all the parties, may have executions vs the persons of all, but he can have but one "Fieri Facias" Can take the goods ~~the~~ of one only, Can have but one satisfaction. Chit 183. Str 515. One Facias Fieri at one time. & Could.

If after judgment vs two or more satisfaction is had from one, the remedy of the other is by audita querela.

Declaration,

The action may in gen be founded on the bill or the consideration of it. As "goods sold" "money paid" Chit 183.233. 284. 1. Burr 223. 2611. Cow 532. Tyd 58. 177. 197. 3. 5th 174. 3. Burr 1516.

In the latter case, the Plff declares on the common counts. "For money had, and received" "Paid, laid out, "Goods sold" "Labour done" Counts of both kind are usually joined Tyd 197. 3. 5th 174. Tal 24 Chit 184.231. 248.

Formerly it was usual to allege the custom of Merchants in the declaration, on bills of exchange, not necessary now even to refer to it. For the L M is not a particular custom, and therefore no more necessary to allege the custom, than the general custom of the C Law. Chit 134.5. 234. La Ray 21. 175. 88. 1542. Carth 83. 267. 270. Ryd 177. 9. 180. 3. Mod 225.

In declaring on Promissory notes, it is usual to allege that the Defendant became liable by Stat of Anne. P Q says, there is no necessity for this form, for the Judges are bound 'to notice it ex officio' Chit 185. 246.

It is not necessary in a count upon the instrument, to allege a consideration, it being implied, *frima facie* by the Instrument. Chit 51. 115. 6. 185. 4. Ryd 48. 2. Bl R 445. La Ray 758.

Nor is it necessary to make perfect the instrument not being a specialty, the having one of its properties i.e. importing consideration Chit 185. 1. Lid 236. 4. T R 388.

If the bill or note cannot take effect according to its form, it shd be declared upon according to its legal operation. Thus if payable to a fictitious Payee or order, it may be declared upon as payable to order. Chit 48. 58. 185. 6. 7. Doug 667. Cow 600. 3. T R 178. 284. 335. 481. 643. 1. H R 313. 569. 2. Do 194. 288.

So payee of a note or bill made payable to his own order, may declare upon it as payable to himself. Chit 187. 2. Thov. 8. Ryd 198. Carth 403.

It is not necessary, tho' usual in actions on bills &c. to allege a promise to pay, Describing the bill, how Plff and Def. became parties to it, and shewing the Def's liability, are sufficient wih't averring a promise. The Law raising the promise on the custom of Merchants. Chit 186. 7. 236. Carth 509. Sal 24. 128. Hardr 456. Ryd 196. La Ray 538. 1. Bern 153.

G. says this Rule is an anomaly. it is not only usual, but necessary also in all other cases. This is a departure from the principle of Pleading.

By procuration not necessary, tho' usual, to state the fact. As Def accepts by Agent, it is not necessary to allege the acceptance, by agent, but by the Principal, for Qui facit per alienum, facit per se. Chit 186. 1. H&R 313. 6. H&R 659.

An Indorsee may declare vs his immediate indorser, as on a bill drawn by Def and payable to Pltff. Chit 137. 8. 121. 190. 1. 4. H&R 149. Burr 674. 1d Ray 743. There may not a subsequent holder do the same, If the indorsmt is in Blank? But this is not usual, The bill or indorsmt are generally stated as they are in fact.

In an action vs drawer or indorser, Pltff must in general allege presentmt for paymt, and as the case may be, for acceptance and Drawer's neglect or refusal? and also that regular notice was given to Defendant, unless he shows, that notice was unnecessary. Chit 86. 188. 4. 54. 65. 186. 202. Doug 658. Burr 2070. 1. H&R 412. 1. Ben 45.

On the common counts, the instrument may in some cases be adduced as mere evidence of the indebtedness, which evi the Def is at liberty to rebut by opposing testimony, as it is only prima facie evidence. These are frequently joined with the count in the bill, out of abundant caution. Chit 189. 190. 2. 173. 3. 1. Esp R 426. Stran 725. 1. H&R 602.

Or they may be sued alone, and supply the place of a count in the instrument. This is seldom done, unless the instrument is defective, for it is abandoning better for poorer evidence. Chit 189. 203. 3. H&R 174. 2. How 501. 2. Shower. 501.

On these counts also the Pltff may go into ^{evi of the} consideration

121.

and thus prove his case by parol. Chit 189. 3. PR 174. 7. Do 241.
1. Esp Rep 249. 1. East 58. Bull N b 137. Str 709. 719.

For the bill does not merge the original debt, for he is not bound to introduce the bill in as much as the bill does not merge the debt as in the case of specialties.

In certain cases the bill may be given in Evi to support the money count, as in an action by payee vs the drawer of the bill or maker of the note, it being evi of money lent is *prima facie* evi. Chit 190. Str 725. Boyle 95. La Ray 75. 8. 12. Moa 380. 3 Burr 1516. 1525. 6. PR 733. 5.

So also in an action of Indorsee vs his immediate indorser, Chit 190. 1. Bur 373.

It is said that a bill or note is *prima facie* evidence of money paid by the holder to the use of the drawer or maker of the note or bill, Chit 191. Boyle 95. Not settled, I G.

Quere can drawer after being obliged to pay, recover vs the acceptor, except in an action on the bill? it is said, he cannot. 1. PR 572.

If drawee not having drawers effects, pay the bill even without protest, it is *prima facie* evidence of money paid, laid out, expended to the use of the drawer, Chit 191. 2. 205. 1. PR 269. 7. PR 579. 76. 1. Esp Re 332. He may recover in an action for money paid so.

The drawer in this case, if it was an acceptance without protest, takes the "onus probandi" upon himself.

If a bill or note is *prima facie* evi of money ^{paid} and received by the drawer, or maker to the use of the holder, For they are supposed to have received the money Chit 191. Pal 283. Burr 1516. Bayley on bills 95.

And it is holden, that acceptance is evidence of an account stated by the Acceptor with the holder, that is, *prima facie* evi, according to this Rule acceptance is equivalent to an account current rendered. 1. Chit 191. 2. 1. HBl. 239. 602.

Evidence

The evi is governed by the pleadings as in all other cases. It is necessary to prove what is put in issue and no more. 18. whatever is essential to the right of action and this is to be collected from the former rules. Chit 199.

Under the general issue, the Plff must prove every material allegation in the declaration Chit 200

Hence he must prove that the bill was made as stated or that legal operation is so and that the Def became a party to it as alleged. Chit 185. 6. 200. Cow 600 Doug 667. 3 Ark 178. 335. 643. 4 Ark 471. 611. Band Pl. 7.

As vs the acceptor it must be proved that he accepted verbally or in writing and if accepted by agent, that he was legally authorized. Chit 22. 200. 7. 1. Esp 14. 15.

If the acceptance was conditional, that the event on which it depended has taken place. Chit 79. 80. 101. 102. 188. 200. Str 212. Cow 371.

The confession of the Drawer having accepted is sufficient evi of the fact, vs him, tho not vs any other party as a co-acceptor Chit 208. 9. 1. Esp 139. 5. 142. Str 648. 1037. 12. Mod 209. Pea R 16. 1. Esp 15.

Against drawer or indorser def's handwriting must be proved or that of his authorized agent. Confession of handwriting is good vs him. Chit 55. 6. 200. 9. La Ray 1336. 1542. Str 399. 609. 8. Mod 307.

vs a person transferring by delivery only, that he did actually deliver the bill is necessary to be proved, tho in general the mere production of the instrument is sufficient evi of the fact, Chit 115. 6. 122. 154. 180. 200. 9. 6. Ark 52. 7. Ark 64. La Ray 928. Lya 90. 1. 12. Mod. 244. 408. 521.

And under suspicious circumstances, that the Pltff. not being original Payee or some intermediate holder) received it bona fide and for valuable consideration, as when the Bill is lost. Chit 51. 124, 201. 9. Bayle 106. 116.

As between Indorsee and Acceptor, the first handwriting of the first Indorsee must in general be proved, even tho accepted after sight of the indorsmt, otherwise no title is deduced to Plaintiff. So also as to Drawer. Chit 201. 9. 12. 18. Pea 20. 225. 1. Esp 180. 2 TR 654. 2 TR 175. Doug 690. 659.

And the first indorsmt being in full, the bill being payable to order, a subsequent holder must prove the Indorser's indorsmt as well in an action vs the person accepting as the party indorsing. Otherwise no title appears in Pltff. So doubtless vs drawer of the first Indorser. Chit 116. 201. 4. Mod. 87. 1. HBl 606.

But if the first indorsmt is in Blank, it is not necessary to prove any subsequent indorsmt, as vs the acceptor; for the first may be filled up to holder. So doubtless vs drawer as well as vs first acceptor indorser himself. Chit 118. 188. 210. Doug 617. 633. Holt 296. Tyd 206. Pea 225. 1. Esp 180.

If payee is fictitious no indorsmt need be proved, vs these parties, who knew the fact at the time, of becoming partners. Chit 45. 58. 187. 59. 61. 109. 201. 2. 3 TR 174. 182. 481. 1. HBl 313. 386. 560. 9. 2 Do 194. 288. Tyd 20.

When drawer or Indorser is def, the Pltff must prove due diligence to obtain the money from the acceptor, or drawer, otherwise there is no breach of contract on their part, Chit 188. 262. Com R 579. Doug 558. Burr 2670. 1 TR 712. 1. Ben 45.

Then *Wt.* must in some cases prove presentment for acceptance. *Chit* 67. 202. 210. *And* 117. 1. *Hon* 565.
 And in an presentment for payment and in both cases in gen notice of refusal *Burr* 66. 1. *St* 81. *Tya* 205. *Sal* 127. *St* 1007. 2 *St* 470.

In case of foreign bills, when notice is necessary, a proof for nonacceptance or nonpayment must also be proved. This is a necessary part of the notice. But production of it is sufficient for it proves itself. *Chit* 90. 1517. 202. 214. *La Ray* 943. *Thin* 172. 6. *Mod* 8. 2 *St* 713. 5. *St* 239. *Holt* 297. 1. *Sal* 131. *Bull* 270. 12. *Mod* 345. 10. *Do* 66.

Exceptions. to these rules, When drawee had none of drawers effects and in certain other cases. *Vide* presentment for acceptance and payment. *Ante* Page *Chit* 68. 84. 101. 2. 3. 132.

In an action vs indorser, it is not necessary to prove a demand upon drawer. Formerly thought otherwise. For their liability is coordinate as to the holder. *Chit* 99. 203. *St* 441. *Com* 579. 2 *Burr* 669. 1. *Esp* 334. *St* *La Ray* 443. *Sal* 131. 3.

If indorser having paid a bill sues acceptor, drawer or any of the prior indorsers, he must prove that the bill was returned to him and that he paid it, otherwise he shows no title. Drawer must prove the same facts when he sues acceptor. *Chit* 203. 4. *La Ray* 443. 2.

If the acceptor of a accommodation bill sues drawer, he must prove in addition to def's handwriting, payment by himself or something equivalent, as being imprisoned under an execution and that he had none of drawers effects. *Chit* 163. 191. 203. 205. *Tyd* 156. 3 *Mils* 18.

If drawer having been obliged to pay the bill, sues

125.
the acceptor, he must prove the acceptance, demand of
paymt and refusal, the return of the bill and paymt by
himself Chit 87. 203. 10. Mod 367. 1. Wils 188.

But he need not prove, that he had effects in drawee's
hands. The onus probandi is on the acceptor, i.e. the
acceptance being according to the tenor. Chit 87. 132. 3. 207.
1. PR. 406. 409. 3. PR 182. 2^d Bl 612

If plff cannot support his count in the bill, he may
resort to the common counts, which are founded on the
consideration of it. Chit 184. 9. 204. Tya 58. 117. 187.
3. PR 174. Burr 1516.

But in *Matter vs Shelly*, 1. PR 300. 303. 236. Chit 204)
Indorser offered to prove usury, but it was rejected;
Overuled in Eng and was holden that in an action vs
the maker of a note by Indorsee, Indorser is a competent
witness to prove, y^t it is paid, tho' as formerly said, not
to prove it void. 14. PR 601. 631. 1. Esp 332. Pea R 40. 6. 52.
224. 1. Esp 1485. 295. 176. 1. Caines 258. 67. Contra Chit 204. 5.
Pea R 652. 117. 1. Conn R 260.

And in an action vs the drawer | notice having been
given of nonpaymt, the acceptor is competent to prove
he had no effects of drawers.

In an action vs the Acceptor, the indorser is ^{not} competent
that the property is in himself and that the indorsmt
to Plff was w^{tht} consideration Chit 205. 1. Esp 85.

And it is holden, that a person whose name is on the
bill, as drawer, cannot w^{tht} a release, testify that
he did not draw. Trials per Pais 2. 502. Chit 205.
Holt 297. 12. Mod 395. 45.

In an action on the bill, the Plff must in general
must produce the bill itself, otherwise if lost, then

a copy or parcel evi of its contents is admissible, for distinction see Title Readings Profect and Lyon, Chit 303.6. *Id Ray* 781. *Atkins* 446. 1 Esp 50. *Reade* 100.

In an action vs acceptor, if he accepted after the bill was drawn and had seen it, the production of the bill is sufficient evi of its having been drawn. The acceptor admits the drawer's handwriting. Chit 206. *St* 442. 648. 946. 3. *Burr* 1394. 1. *Bl* 90. *Id Ray* 444. *Galk* 127. 12. *Mod* 244. *Holt* 117. 7. *L.R.* 604. 12.

So that in such case proof of drawer's name being forged is no defence for acceptor vs a bona fide purchaser. *Bul* 270. Otherwise if he accepted with sight of the bill.

The same distinctions hold when the action is vs the indorser. Quere when the action is vs any other indorser, than original Payee.

The payment of the money into court is an admission of the def's signature. Chit 208. 2. *H.R.* 474. 1. *T.R.* 474. 64. 2. *T.R.* 275. 1. *Exp* 307. 5. *Burr* 2639.

But an offer to pay an part by way of compromise is no evi. Chit 208. *Bull* 236.

When the Pltff claims as holder by bare delivery, the mere production of the bill is sufft evi of his title. Otherwise if under suspicious circumstances Chit 209.

If he claims on a bill transferable by indorsmt only, he must in gen prove the first indorsmt and as the case may be the subsequent one, *Ibid* Auct.

If acceptor having paid a bill *supra* protest¹ mes drawer, the protest (I suppose) is prima facie evi of his having none of drawer's effects. Chit 209. 10. 103.

In an action on a foreign bill vs Drawer or indorser

174

the protest is said to be sufficient evi of presentmt for
paymt and refusal. The bill must be produced on trial
for the whole declaration must be proved, Chit 160. 200.
Beawes Pl 200. 2. Hall 1325. Bull 2703. 4 TRe 175. Skin
272. Pea Evi 74 N.

But in case of an inland bill, the bill itself must
be produced for the purpose of proving presentmt and a
refusal, as well as the fact of its having been made,
For there is no Protest Chit 205. 210. Pea R 165. La Ray
761.

Proof of a letter containing information of the bill being
dishonoured, was put into the Post office or left at the
Def's house, is sufficient evi of a notice given Chit 95. 200.
2. HBL 509. Pothier Pl 148. 1. Esp. 5. Burr 199. But to hit in
this evidence, notice must have been given to the Def to pro-
duce the letter, Chit 210. Pea R 165. Pea Evi 107.

Action of debt on Bills.

The action of debt on a simple contract was formerly
in use, afterwards disused on account of the wagers of Law
which exposed the Plf to great hazard, Chit 204. 2 HBL 155.
341. 3. Coke L 155.

And formerly the whole sum demanded or
nothing must have been recovered, 2. Role 706. Dyer 214.

These difficulties are now remedied, at this day wagers of
law is not allowed, and it is also determined it is not
necessary to recover the precise amount Doug 6. 703. n 2 Role
R 1221. 2 BL R 1221. 1. HBL 249. 550.

The action has lately been revived, is a common action
to recover money on a simple contract Chit 219. Band P
249.

It has been holden, that debt will not lie on
a bill of exchange in favor of Payee vs acceptor. Because
there is no privity of contract Hard 455. 485. 1. Mil
185. Chit 220. Cro In 687. Disagrees with Chit JG.

But if A delivers money to B to be paid C. C. may maintain an action of debt vs B. *Ibid* 2 Roll 441. 597.
Yelv 23

Besides the acceptance amounts to a promise to pay the holder, therefore there is a privity *Ld Ray* 88
Com Dig Debt A.

This action has been so long disused, that it does seem to be settled in what cases or class of cases, it will lye. apply. *10. Mod* 38. *Potrange* 680.

Partnership Property 200 Factor 202
 Stopping goods in Transit 204

Partnership.

Partnership can only be created by voluntary agreement. If two or more Merchants join their property in general they become partners.

A partner may separate at will, but is liable for all injuries to his Copartner.

Where no express stipulation of the profits to be shared, these profits and losses to be shared proportionally according to the stock of each. P

To make one liable as partner to third person, there must be an agreement to share profits and losses, or permitting one's name as a Partner. will subject him to third persons. To lend one's name to a firm will subject the lender. Cow 793. Mats 40.4.

If then 2 persons advance their money together in the purchase of a particular or same lot of goods as a cargo, for dividing the property between them, this ^{don't} make them partners. Unless they purchase it to trade upon Mats 45.8.

If A. B and C ^{agree} that A alone buy goods in his own name, but that B. C. share one third of it at the first cost, does not make them Partners.

To subject one as partner he must be jointly interested in the purchase, but future disposition of it. 1. HBL 37.

Partnership. Property.

Property of each partner pays the remaining company debts. But the company property is not liable for their private debts.

When the company debts are paid, then each one's share is liable for his respective private debts.

Each partner is not bound at all for the other private debts of his associate. 1. best 366. 2. Hod 279. 2. D. 279. 1. Shaw 173. 2d Ray 87.

If different business trade at different houses, but jointly share the profits, each one is liable for losses, as it respects their business in wh they share profits. It is settled that this is a partnership. 1. P. W. 682. 2. H. B. 247. Doug 37.

If one of the partners die, his Ex^{or} and the remaining partner must account. But not on the principle of *Debitatus Assumpsit*. If the survivor has taken more than his share, he can't be sued for money had and received, unless the amount has been settled and the balance struck. You must apply to Chancery or bring an action of account. 2. D. 478.

If one of several partners contracts in his own name, you may sue the firm if the ^{property} partner be for the use of the firm. But if one partnership as surety for contracts, such contracts cannot or are not within the scope of the partnership. The Firm are not liable as in the purchase of lands, neither which the firm are not concerned, unless it was for their use. For contracts within the scope of the partnership, the firm is liable. 1. D. 708. 728. 7. 1. H. B. 40.

Contracts made or in the name of the firm will bind the Firm. And after partnership is closed, contracts by one will bind all, unless notice has been given of the dissolution.

Where a general notice has been given, all are presumed to know it. The mode of notice is disregarded. 1. Sal 292, 1. Bl 154

Property which is not the subject of mercantile transactions can't be conveyed to a company. If it be conveyed to Band & Co it vests in B alone, Burr Rice vs White.

There may be a partnership where they share the profits, but not the loss, that is, each bearing his own loss. But if one fails, it has been decided that this is a partnership, and that both wd be liable for their contracts notwithstanding. Accordingly a dormant partner whose name is not used, if found to be a partner, may be sued with the certain partner. 4 TR 705, 27 1. HLL 458.

When one of a firm purchases property for his own use, in the name of the firm, there is a presumption, that the property - the person of whom the property was purchased, is ignorant that it was for the use of one, but the presumption may be rebutted. And if it is shown he knew the property was for the private use of one, the other will not be liable.

Illegal contracts entered into by one of the firm, will not bind the firm, unless the others promise to share in it, or are privy to it and know it to be performed.

These rules apply to Firms where they are solvent, they are different where they are insolvent.

The practice of collecting private debts of one of the firm from the firm is to bring double the debt on the company and repay half which he holds in severalty, Or to select property levied upon in the articles sold, or to levy double amount of property and sell one half, the other half without being sold is the other parties.

Pro jus accrescendi between Partners as between Jointenants. This is Law No regulation.

Factor

A factor is a man employed by a merchant in one country, to transact business for him in another. He acts under a commission and whatever it be, he must adhere strictly to it, and is liable to his principal if he does not. But tho' liable to his principal yet the contract which he makes as factor with third persons is binding on his Principal.

If the Factor lives in the same country he is called a Broker. Those Commission are general or special. The former are generally thus "To buy, sell, contract as his own," and vest the Factor with discretionary power, to act as he pleases. But he is liable to his Principal for acting as a man of ordinary prudence, and have acted, *Nelw 202. Bulst 103.*

A Special Commissioner is to "sell and dispose" without words of distinction as above under this commission.

The factor can't sell on contract, if he does, he runs the risk himself, and the Principal may immediately call upon him, for the money. *2 Mod 102. 10. 144. 2 Vern 638.*

Formerly the remedy between the Factor and his Principal was by account. Now in Eng application is made to Chancery, to bring factors to a settlement, for they can they can compel a production of papers.

It is common for one man to act as Factor for several houses or firms who may be strangers to each other.

Tho' strangers they sometimes run a joint risk, as where they consign to Factor a property of w^h they make a joint sale, and credit and Purchase or fails.

The different houses bear equal share of the loss. If the Factor had no authority to sell on credit, he himself is liable. So also if he becomes a Bankrupt, the money must be equally divided.

263.

If the factor draws on them a Bill and presentment is made to one who accepts it, the others are not bound by the acceptance. *Salk 126. 216. 1. Roll 124.*

The factor must use ordinary diligence and is not liable for inevitable accidents. *Co Litt 89. 4 Co 84.*

The Principal must conduct himself fairly. If he send damaged goods to the factor who with knowledge of it and without examining them, sells them to a third Person, the factor is liable to the purchasers but the Principal is liable to the Factor. *Cro J. 416. 468. Both 142.*

If the Factor smuggles the goods, so as to save the duties and charges them to his Principal as paid, the Principal is liable for the charges. *Cro J. 260. Burr Merchant Factor, Ridge R.* thinks this an abominable decision. The reason given is, that that one State pays no regard to the revenue laws of another.

The Sale of the factor always binds the Principal. The factor can't pledge the goods, it wd not be good, in the hands of the person to whom they are pledged, if the person pledging was known to him to be a factor and the goods to belong to another person. But otherwise if he was not known as such to the Purchasers, but appeared to be the owner then the pledge is good.

If the factor is limited in his purchase, and buys more, the Principal is bound. *2 Str 778. 1178. 2 Bent 698. Burr 489.*

If he injures his principal by exceeding his Commission, he is liable for damages and loses all his wages. For it is impossible for a factor ^{or manager} to ascertain the limits of a factors Commission. *1. Burr 489. 2 Bessy 239.*

If the Principal fears factor will fail, if he be publicly known as factor, principal may notify his debtors not to pay him. *Cow 155.* and if after such

they do pay, they shall be liable to pay the Principal again or they then may recover of the factor.

If he is only a private Factor it is different. The factor has a lien upon the goods in his hands for his commissions and balance of accounts, 1. Burr 489. The factor is often himself a merchant and when his interest and that of his Principal clash, he must consult that of his Principal.

If a factor die or become a Bankrupt, his Ex^{tn} in the one case, and assignees in the other have no control over the property of the Principal in his hands. If the property be so mixed that it can't be separated, it rests in the Executor or Assignee, who are liable to the Principal. 1. Vern 628. 98. 178. Burr 638. 1. Pal 160.

When a factor sells for less than he is authorized to do, the purchaser retains the property, for this is between the Factor and Principal.

Stopping Goods in Transitu

This is peculiar to the Law Merchant and is the right which Merchants have of stopping their goods after they have sold them. By C Law. the property rests in vendee immediately on sale. 1. Hobb 505.

By the law Merchant the property is not transferred, till the goods are in the possession of the vendee or Agent. They may be stopped, tho' delivered to the Carrier, to be carried off. It ends however when the goods are put on board the vessel. When delivered to a special carrier it is different.

Vendor is liable for all damages, vendee sustains if he is in innocent circumstances. This proceeds on the ground of preventing frauds vs Merchants -

But if the bill of lading has been assigned to a third person, for a valuable consideration, the transitus has terminated. for being a negotiable instrument ^{it} has been ~~from~~ it will carry the property. But if it is transferred for any fraudulent purposes the transitus is not terminated.

2. T. 65. 1683.

Dissolution of Partnership 218. 19-

How far affected by each others wrongs
and torts 216- 4 How are accounts
to be settled between Partners? 217.

Partnership

The contract of partnership, is one by which two persons or more unite their money, goods or labour, for the purpose of profit, upon an agreement that, the profit or loss shall be divided proportionally between them. Doug 356, 71 2 Bl R 998. 2 B Henry 247. Watson 17 4 East 144. 1 HBL 37 4 Esp 182.

He who agrees to share with another the profits of business, makes himself, as to third persons, liable to the losses. Even tho' there shd be an express contract to the contrary Cowp 814. 1 HBL 57 12. Mod 446. Wats 27. 2. 35. 44. 573.

And this Rule extends to all his private individual property, personal or real - his liability is unlimited. Bam 342. Wats 35.

And the rule holds as to parties transacting business in different houses, and under different firms, provided they agree to share in the profits and losses of any joint operation. Cowp 814. Wats 27. 73.

It has been questioned, whether this stipulation not to be liable for losses, was binding between the parties. I Gould says, it is. The objection usually made is that of usury - Now this may or may not exist and it is conceived where the fact cannot be shown, the objection will not lie. Besides I G thinks it is rather straining the matter, that the transaction is in any case, per se usurious.

Limited Partnerships are frequent on the Continent of Europe. Allowed and regulated by the Civil Law. In these partnerships, no partner can be subjected to a loss, exceeding the amount of his stock. They have been lately authorized in N. York. The terms of the partnership must be registered in some office established by Law. or published in the News paper. The utility of these partnerships was fully explained by the learned Judge.

Partners are of course joint-tenants of all the stock and effects as well original as acquired, the moment they execute the contract, each one ceases to be sole proprietor of his stock, and both acquire a right in the whole. But persons holding property as tenants in Common or Jointtenants are not therefore partners - it will be seen, that an express contract of copartnership and a division of profits and losses is necessary

Tho' partners are Jointtenants, and seized per my and per tout. there is no jus accrescendi between them. The Mercantile law don't recognize that principle, Comb. 474. Mats 63. 21. 124. 128.

Still however remedies and liabilities survive to the surviving partner. Rule applies only to effects

A person advancing money to another under an agreement to share profits, may make himself a partner without intending or being aware of it and to determine when such a transaction amounts to Partnership in Law, we are to be governed by this Criterion. If the agreement is, that he is to have a fixed remuneration, not depending upon the amount of profits, he is not Partner and the reverse is true of the reverse 2. Bl R 947 96. Mats 27. 31.

A partnership can be created only by a voluntary agreement express or implied.

If two or more persons join their capital for any particular object of trade or for trade in gen, they become partners.

There are cases in which executory agreements for entering into partnerships, may be enforced in Chancery. A partner may be allowed no doubt to withdraw, when he pleases, but where serious losses wd be incurred, Chancery will interpose. 2 Ves 33. Mats 22. 4. 3 Atk 3334.

Where there is no express stipulation as to sharing the profits, a proportional share shall be intended - The Gen Rule that the profits shall be divided equally, is

manifestly incorrect, "in proportion to the capital of each" is a necessary qualification

To subject a person as a partner, it is sufficient to show that he has agreed to be held out to the Publick as such, Doug 371. Cow 973. Mats 40.4. as lending a name to the Firm &c.

When two persons advance their several monies in the purchase of the same cargo &c for the purpose of dividing the property and not for trade, they are not deemed partners. Doug 371. 1. HBl 37. Mats 40.5.8. They do not share the profit and loss &c.

Further if A. B. and C. agree that A shall purchase in his own name a cargo, and that all shall share in the property, each taking a third, they are not constituted partners; the contract to share, is called a subcontract.

In general to subject one as a partner he must be interested in the future disposal and command of the property as well as in the purchase. Watson 45. Doug 371. 1. HBl 37. Mats 45.

And if one retiring from the concern, lends money to the other upon interest with an additional annuity, he does not thereby continue a Partner. 2 Bl R 998. 9 But if the annuity was expressed in the contract to be in lieu of profits, the transaction would amount to a continuance. Mats 44.5. This nice distinction is grounded on the principle that the annuity is virtually a purchase of the retiring partner's share of the accruing profits.

When the retiring partner sold his stock to the other for a sum certain, and an annuity expressed to be in lieu of profits, it was held to be a renewal of the partnership on the principle, that the annuity was virtually a purchase of the retiring partner's share of the accruing profits 2 Bl R 999. Mats 44.5.

If one of two joint merchants dies, the partnership remedies survive at Law, to the survivor, Hence the Ex^{or} of the deceased partner can join as pl^{ff} with the Survivor to recover debts due to the partnership concern; for there wd be a legal incongruity in the Pleadings. The survivor wd sue in his own capacity and the executor as Representative of another. Falk 444. Esp Dig 118. 3 Ves 242. 252, Wat 49. 63. 100. 124. 128.

But the right or interest of the deceased partner is transmitted to his representatives, and the surviving partner is as to the deceased, trustee for the representatives and must account to them for what he recovers. Ld Ray 341. Mats 294. 5.

Nor on the other hand, can executor of deceased partner be joined as Def with Survivor by partnership creditor, for the whole liability at law, survives against the surviving partner. But if the survivor is compelled to pay all the partnership debt, he may in Equity compel the representatives of the deceased to contribute Falk 444. Comb 474. 2 Lev 228. Caith 170. 3 Lev 290. Mats 63.

Besides there wd be an insuperable impediment in the manner of giving judgment as no one wd be charged de bonis propriis, the other de bonis testatoris.

Still if the creditor cannot obtain satisfaction from the surviving partner, they may subject the Executor of the deceased partner in Equity 2 Vern 277. 292.

How far and in what manner, one partner may bind others by drawing, accepting, or indorsing blas. or Promissory notes vide Bills of exchange. Hyd 18. 68. Falk 126.

Here there is a material difference between Partners in trade & trading corporations - for no one corporator as such can by his sole act bind the company, for

the body politic, can only be bound by a corporate act. *La Raymōd* 175. *Falk* 126. 442. 445. 5. *Mod* 395. 12 *Mod* 345.

Indeed individual members of the corporation are not personally bound, nor is their private property liable to their Corporate debts 2 *TP* 672. 3. *After of Partners.*

hint to Legislature To subject private property to corporate debts. I think bad plan -
Hinde

A partnership in trade may be either general or special. It is general ^{when} formed for the ordinary and general purposes of trade, and when it extends only to some particular concern or single adventure, it is a special or particular partnership. as when it embraces only a particular voyage. *Mats* 52 57 58. 73. 4. In both cases, however it respects personal chattels only. 58. 38.

And the property or effects to wh the partnership ^{extends} becomes the property joint of the partners, from the time when from the terms of the contract it is to commence. Tho' the property of one partner shd not be delivered at that time, and at the place of trade, yet it becomes the joint property of both. For the possession of each is the possession of all. *Mats* 58.

Partnership concerns are governed by the Law Merchant. And the general law of partnership is a branch of that code and the code itself is incorporated in the Common Law. *Co Litt* 116. 2. *Roll* 114. *Mats* 52.

In partnership concerns Cts of equity have acquired a concurrent jurisdiction with Cts of Law. Their power of compelling a discovery has led to a jurisdiction of all matters of account. and as incidental to cognizance of accounts they have acquired ^{of} partnership which always embraces matters of account. 3 *BC* 437. jurisdiction

Indeed in Eng the jurisdiction of accounts or matters of account is exercised almost exclusively in Equity -

In Conn resorts to cts of Equity are not common.
 A debt contracted by one partner in the name of all
 will regularly bind all, in what concerns their joint
 trade. But if any one disclaim or protest that
 he will no longer be considered as a partner, he will
 not afterwards be liable to third persons trusting the
 firm. with notice of the Protest Talk 292. Mats 59.

So a debtor of the partnership may safely pay the
 debt to any one of the firm and such payment will
 bind all the partners. For payment to one is payment
 to all. Again a sale of partnership effects by one, is
 valid, as it is deemed a sale by all, 12. Mod 447. Mats
 61. 2. 80. 110.

The distinction laid down in the books is that the
 act of one is the act of all and binds all if it
 concern the joint trade, but if it only concern his
 private affairs, it binds the partner acting only, and
 not the firm, 1. East 48. Talk 126. 290. Pow or B. 2. P. 290.
 Ryd 19. 78. Mats 49. 58. to 61. 104. 5. 229. 252.

This distinction is undoubtedly correct, where
 a partner makes a contract in his own name and for
 his sole benefit, but the latter part of the Rule is too broadly
 expressed and includes more than is meant.

A dormant partner is an ostensible partner.

But suppose that one partner borrows money, buys
 goods or otherwise contracts a debt on his own sole behalf
 or for his sole benefit but ostensibly for the partnership
 doubtless the other partners will be bound by his contract
 provided the other contracting party did not ^{know} _{no} that he
 was acting solely for himself

In special partnerships the shares of stock must be
 joint and there must also be a community of profit,
 and in gen of loss also, for the qualities of special
 partnerships in this respect, are similar to a general
 partnerships. Mats 74.

But owners of a ship contracting for the carriage of goods or freight for a particular voyage are deemed special partners as to that particular concern, for here is a community of profit and loss. 2 Vent 196. 2 Roll 248.

Palm 399. Wats 74.

But owners of a ship by the strict principle of the C^l Law are joint tenants, but now by the Law Mer they are tenants in Common, and this law governs the Question Ray 15. 1 Lev 29. 1. Feb 38. 3 Geny 228. Wats 756. 8. 3 Leonard 228.

Hence each part owner being possessed per my et per tout any one of them may by C^l Law make take possession and prevent a voyage, projected by the others and such is the rule at C^l respecting all joint tenants for there is no coercive remedy between them. Wats 78

But owners of a ship as such are not partners; for a ship in ordinary cases is not built as stock in trade, tho' doubtless if partners build a ship as partners, there the partnership extends to the ship.

By the maritime law the party projecting a voyage or adventure may by entering into a stipulation. *Ita*. Ct of Admiralty, prosecute the voyage and the other can't prevent him. This stipulation is in nature of a Recognisance entered into by way of security, to the dissenting partner, or partowner. This stipulation can only be entered into in a Ct of admiralty, — it being a proceeding unknown to the ancient C^l Law. *Lo Ray* 222. 3 238. *Str* 826. 890. 1 *Mils* 101. *Ray* 78. 1. Feb 38. 1. Lev 29. Wats 75 to 80.

By this security the partowners who send the ship to sea, are bound to indemnify the dissenting owner, from any loss or damage done to the ship, ~~she~~ she being at the sole risk of the parties who adventure. *C. Mod* 162 12. 26. 79. *Carth* 62.

And an action lies in Ct upon the stipulation in the Ct ^{213.}
in which it is taken. This at least seems to be clearly the
better opinion. Wats 77. 79. La Ray 235. 1255. 6 Mod 142.
Burr Re B 415. Contra Carth 26. Comb 169. 09. Holt 147.

Wats 78. 8. Holt 147.

If a partowner disapproves a projected voyage,
but does not expressly forbid it, he can't have any
remedy against the other owners, tho' the ship is lost
during the voyage, for ~~he~~ not if he does not expressly
dissent, he is supposed to assent. Carth 26. Wats 79.

The stipulation is the only mode of expressing his dissent.

In this case if the ship returns, the party disapproving
of the voyage, is entitled to an account of the profits of
the ship and also to a share of the profits of earnings.
Tho' he contribute nothing to the voyage, I Gould.

In an action vs a wrongdoer for taking away or hurting
the ship, partowners may sever, IE, may each bring his
separate action, and recover his proportion of the damages
sustained. This is not in accordance of the principle of
the Ct in regard to jointtenants, but is agreeable to
the Rules of the Maritime Law. 2 Leon 228. Raym 15. 1.
Dev 29. Wats 75. 1. Feb 38.

In case of partners in trade, each may dispose of any
or all of the effects: for each is agent for the partnership
and such sale is within the general scope of the trade;
Cowp 440.

A shipmaster is not as such a partner with
the owners, tho' a master may be a partner, provide he is
partowner. He as master is only an agent for the owners
and in the choice of a master each partowner votes influences
in proportion to his share or shares. Holt 11. Maloy 310.
322. Milly Wats 80. 1. Maloy 310. 322.

Each partner acting for the whole, is bound to use
the same fidelity and care as a man of common prudence
wd use in his own individual concerns, IE, ordinary
care and diligence, for as to the shares of the other partners,

the partner acting is in the nature of a Bailien. Mat 113. And if a loss accrue through his omission of that degree of care and fidelity, he is answerable to the other parties for the loss. So also if a loss ensues by his exceeding his authority, he is liable Mats 111, 113, 115.

But he is not liable for any loss happening without his fault, as mistake in calculation or judgment.

The usual right of each partner to sign an instrument for the whole, may be confined by express agreement to one of them. If this agreement is known to those dealing with the Comp- it will be obligatory between them as it between the Partners Mats 115.

By the strict principles of the C. L. ^{partners} are jointtenants, and possessed per my and per tout, yet we have seen that they have no jus accrescendi between them and further no part of the partnership effects can become the ultimate and exclusive ^{right} of either, except his proportion of the residue after a balance of accounts struck between them.

It does not then follow of course, that upon a dissolution one partner is to have one half and the other the remaining half of the effects, but this must depend upon a balance to be struck between them. Cowp 448, 449, 471, 2 TR 478. Esp D 96, 97. As A and B becoming partners advanced equal shares of stock, the value of the stock at the time of dissolution 20,000\$. A owes the partnership \$10,000 which added to the stock, makes 30,000, of which B is to receive 15,000, and A 15,000, but as he has already received \$10,000. The amount of the debt he owes the partnership. He of course takes but 5,000\$ of the amount of the stock, at the time of dissolution and B takes the remaining 15,000. For the Creditor Partner has a lien upon all the effects, for what is due to him, from the other partner. His representatives have also the same lien, and the representatives of the debtor partner are subject

to the same lien 1 Ves 242. Wats 124, 28, Bessy 252.

If an execution issues vs one partner for his private debt the goods of the partnership may be taken to satisfy it, but only an undivided half, (where the shares are equal or no more than the debtors share. What is taken may be sold by the officer and the purchaser then becomes tenant in Common, & with the other partner of the part sold. For the sheriff can't make a division of the goods, & cannot sell the whole of any one article, but only one undivided half, as he has not the power to select the goods and leave only this refuse with the solvent partner. Palk 392. 1 Show 173. Holt 302. Com Re 217, 277 626. Doug 650. La Raynd 871. 3 Pow W. 25. Cowp 445.

So after dissolution by mutual consent, the legal interest remains as it was before, i.e. they are still joint tenants or rather tenants in common of the partnership effects tho not partners. For a dissolution does not per se, change the possession or make a partition of the property. it only ends their relation as partners. Cow 449. Wats 125. 140.

Hence after a dissolution the separate creditors of one partner can't effect the partnership stock any further than the partner himself might have done, i.e. the creditors of the partner can take no more than he is entitled to after a balance is struck, and the same rule holds where one partner has become a bankrupt. The creditors of the Bankrupt can take no more of the partnership effects, than the partner wd have been entitled to, had he not been a bankrupt. 1 Ves 242, 250. 2 Vern 293. Wats 124. 140

If one partner becomes a bankrupt, the other partner may for a valuable consideration and wth fraud dispose of all the ~~other~~ partnership effects, for his power over the effects is not diminished or impaired by the

by the insolvency of the other and tho' he sd afterwards, fail, the bona fide vendee will ^{hold} the goods against the assignees of both Partners Cow 445.

If one Partner takes out of the partnership stock, more than his own share, his separte estate is liable to the other partner for the excess. 1 Atk 225. Mats 148. 151.

If one partner has received money due to the Partnership and retains it in his own hands, the other partner cant maintain Assumpsit for it, or for any part of it, until a balance is struck. Cow 449. 2 JR 278. Esp Dig 96.7. Mats 22

And even after the dissolution of the partnership, one partner can ^{not} maintain trover against the other for a moiety or fractional part of the effects, for they are still tenants in Common, tho not partners and the right of each is only to his share remaining after a balance struck. Cowp 449. Litt 3. 21. Mats 140. b 294.

How far affected by each ^{others} wrongs and torts.

If an illegal contract is made on the partnership, by account by one partner even witht the privity of the other they cant maintain any action upon it, for the law cant be violated even to protect the innocent partner from loss. As if one of the Partners on the account of the firm enters into a smuggling contract, by which he is to receive a sum of money, he cant recover it. 3 JR 434. Mats 160.

But where such illegal contract is made abroad, if the Person claiming under it is a foreigner, and was not himself an agent in the prohibited act, he may recover upon it, in our Cts. Cowp 341. Tho where an Englishman contracted in Holland with a Dutch merchant for certain teas, the Dutchman knowing they were to be smuggled, it was held, he might recover tho' if ^{he} had been an Englishman he cd not. Cowp 341.

If two or more persons engage in a smuggling transaction all who are privy to it, are liable to a prosecution, tho' part of them were not present, not agents in the prohibited act and in this case they may be proceeded vs either jointly or severally. Com R 616. Burr 96. Wats 181191.

But if one partner only is engaged in a smuggling transaction without the privity of the others, tho' on the partnership account, the partner not privy to the illegal transaction is not, I trust, liable to punishment, tho' he may suffer eviliter as he can't recover on the illegal contract, for no man can be punished unless his will concurred in the illegal transaction.

The offending partner, however, wd be liable over to the other for any loss he may sustain, as agents wd in such a case be liable to his Principal.

If partners are engaged exclusively in an illegal act such as smuggling, they are yet liable to the bankrupt laws in case of insolvency, for the bankrupt laws are made for the benefit of creditors and not of the debtor. Salk 199. Wats 194

If a contract purporting to be a contract of partnership, is in substance a disguise for usury or any other illegal act, it is not binding. vide little Cow 192 4 JR 360.

How are accounts between partners to be settled?

In the adjustmt of accounts each partner is allowed what he bro't into the common stock, and is charged with what he ^{has} taken out, and a ballance found by two or more partners against one of them, is not therefore all due to the other or others, but is due to the Company: so that the half or fractional part of the ballance will belong to the debtor partner himself.

The Stat of limitations does not run between partners yet

after their dealings have ceased for a long time. Equity will not decree an account but will leave the controversy to be settled by law, for the power of granting an account being discretionary with the Ct, they will refuse the bill for its inexpediency. Wats 212. 213. Gib Equity Cases 234.

The only remedy at law between the partners, when the account is unliquidated, is by an action of account, but but the more usual remedy in Eqty is by bill in Chaney as the common law actions of account is not sufficiently remedial. Co Lit 172. 3 Bl 437. 481. 6

In Con, our Stat has made the account sufficiently remedial, so that resort to Equity here is not usual.

But after adjustment by the partners, and balance struck, the Partner in whose favour, the balance is, may maintain assumpsit vs the other for that balance, for the account is already balanced, there is no need of bringing in an action of account. This is Assumpsit "Insimill Compulacit" 2 L.R. 438. Wats 221.

If it is agreed in the articles of copartnership, to submit all controversies between them, to arbitramt. The agreement it seems may be pleaded in bar to a bill in Equity. proviso the submission gives authority to the arbitrators to examine the partners as well as the witnesses under oath.

It is clearly no bar when discovery is sought by the bill, unless such authority given to the arbitrators by the submission. because without such authority the arbitrators can't command all the sources of information, wh a Ct of Equity deems indispensable. 2 Atk 730.

If the partners borrow money, wh goes to use of the partnership, tho' advanced upon the sole bond of one of them and they become bankrupt, the lender may come in as Creditor under the joint commission i.e. as the firm,

At law however the creditor could recover no partner giving the bond only. 1 Atk 225. Mats 229.

For the rule relating to the joinder of the partners is different in common cases and the modes of taking advantage of their nonjoinder. and Pleadings Mats 229. 1. HBB 236

Where partners in trade having both joint and several creditors, become Bankrupts, or where one of them becomes so, the Rule established in Equity for applying their joint and several property towards payment of the different classes are as follows

1st The joint or partnership partnership property is to be applied to the payment of the partnership debts and the separate property is to be applied in the first instance to the payment of the separate debts.

2^d If there is a deficiency of joint property and a surplus of separate property, after payment of the private debts, that surplus is all liable to the joint debts. This rule supposes the firm only insolvent and individual partners not so.

III If there is a surplus of partnership property after payment of all the joint debts, as where one of the partners only is insolvent, then so much only of the joint property as belongs after balance of accounts, to that partner, i.e. the insolvent one is liable for his separate debts. 2 Bern 293. 3 Bro Chan 457. 2 ibid 115. 119. 1. Ves 242. 52. Cowp 449. 5 TR 601. 8. ibid 142. 1. Band P 547.

But if the partners becoming bankrupts are bound in a joint and several bond, the obligee may elect to come either on the joint or several property, for as they are jointly and severally bound, he may claim as creditor of the partnership or of each partner severally. but he may not come upon both i.e. the joint and several property, except where,

except when there is a deficiency in the firm fund, which he looks, and a surplus in the other. *Atk 107. Mats 249.*

If on dissolution of the partnership, the partners agree that one of them shall take all the effects and pay all the debts and give public notice of this agreement to their creditors, that they are to look to that one partner for their claims, yet this does not prevent the creditors from recovering of all the partners, for this act of the partners cannot bind creditors. *Str 403. 2. Equity Cases 167. 630. 1. B. Millers 683*
This is binding between the partners.

Acts subsequent to a delivery of goods, may be such that they were purchased on the partnership account, as if A and B being partners, A purchases goods, as if for himself only but brings them into the trade as joint property. *4 TR 720.*

But if it is clear, that no partnership existed at the time when the purchase was made, no subsequent act by that person afterwards becoming partner will make the others liable for the price of the goods, No such subsequent act can make him a partner at the time of the contract by relation or retroaction. As A & B agree to become bankers in partnership each to advance as his share 5000 £ into the common stock. A for the purpose of procuring his share, borrows 5000 £ of P. Q. and pays it into the concern. This act does not make B the other partner liable to P. Q. for the loan, for it is a separate debt of A's. *4 TR 720 Mats 259. 271.*

Dissolution

Partnership contracts may at any time be altered or dissolved by consent of all the partners, even when they have contracted to continue the partnership for a fixed time, as 5 years, which has not yet expired. *Mats 273.*

And when no time is fixed for the duration of the partnership, any one of the partners may withdraw from the firm at pleasure except in circumstances which would render the act

dishonest and injurious to the others as in the midst of some important adventure wh his withdrawing wd defeat or endanger. Mats 273. 274.

But when a time is fixed, he can't thus withdraw at will I conceive, tho' no such emergency shd forbid it, but must remain still according to agreemt to his partners and liable with them to third persons.

And a fraudulent or unseasonable secession in such a juncture as must render it dishonest and injurious to the other parties is not allowable, it seems, whether a term was fixed for the dissolution or not, and he wd not only be liable with the other parties to third persons, and to losses, but as the case might be, liable to the other partners for losses occasioned by his abandonment of his duty to the partnership. as seceding when abroad and abandoning the object of a voyage or journey wh he had begun on the Company's account. Mats 275. 277.

These rules wh involve much discretion in their application are enforced generally in Equity.

Partnerships may be dissolved in either of the several ways besides that of mutual consent. As

I. By that effluxion of time, where its duration is fixed Mats 275.

II. By dividing all the joint effects, and holding them severally after a final liquidation of the Partnership account. Mats 275.

III. A partnership contract for a single dealing or adventure is of course dissolved by a completion or settlement of the concern. Mats 276.

IIII. A partnership may be dissolved by an award. If in the submission the arbitrators are empowered to award a dissolution Mats 276.

V So by the bankruptcy of the firm or of either the partners Mats 282. 2 Cow 448. or 478. 71. it being a Stat assignment of the Bankrupt's property to the Assignees.--

A commission of Bankruptcy is in the nature of an execution and under a commission vs one partner all the joint effects may be taken by the assignees. Mats 283. 285. 1. bern 153.

VI. By death of one of the partners. And this Rule holds, tho the partnership is composed of 3 or more persons. Ever in such a case the whole partnership is dissolved entirely, unless there is a special agreement in the articles of partnership, that it shall continue between the survivors. Mats 27.

But a temporary mental derangement of one partner, is not a dissolution, ^{but} ~~and~~ if a recovery is improbable, it is a sufficient cause for dissolving the partnership. Mats 295. 296.

But even in a case of a partnership of only two persons, if it is stipulated in the articles, that on the death of one, the partnership shall be continued with or for his representatives, the agreement it seems may be enforced in Equity. Mats 295. 292. Bern 33. Mats 297. 297.

VII. A partnership may also be dissolved by an attainder of treason or felony of one of the Partners, the attainder being a civil death, having the same effect for this purpose, as a natural death. Mats 298.

But it is said, in a partnership of farmers. i.e. that is tenants and lessees, the death of one is not a dissolution of the partnership, for as the representatives of the deceased partner are bound by his contract to the Landlord - the engagement between him and the survivor must also devolve upon them. Mats 290. 299.

This proposition is expressed in terms too comprehensive tho the rule may still be correct.

If after the death of one partner, the other continues the trade with the joint stock, he shall account with the Executor of the deceased partner ^{for} the profits.

Wats 301. 1. P Mill 147. 10. Mod 20. 2 Equity ^{Chas. 5.} 722.

223.

And on a bill for an account of a copartnership.
where both partners dead, the Ct will appoint a Receiver
Wats 30. 33. 2. Bro Chaney 272.

Index of Insurance

Marine Insurance 224. Who may be
Parties 225- What may be insured
226. The Interest 231. Vager Policies
233. Valued Policy 235. Reinsurance
235. Double Insurance 236.
What Particular risks within the
Policy 239- Duration of the
Risk 242. Terms of the Policy- 252
Description of the voyage 256.
Perils insured against 258
Powers of the Insured in case of
Misfortune 259- Warranty 261.
Convey 264 Representation 270.
Warranty 271. Concealment 273.
Conduct of the Ship 278.
Abandonment 287. Salvage 297.
Adjustment of loss 308. Return
of the Premium 311 Proceedings on the Policy
316. Assent of Interest 316.
Attorney and Respondentia Contract.
322
Insurance on Lives 324.
Insurance on Fire 327.

Insurance

Insurance is a contract, by wh one party in consideration of a stipulated sum, undertakes to indemnify another vs certain damages arising from certain perils. The word "Peril" is here used to denote the consequences of the danger, rather than the peril itself Marsh Ins. 1. that is damage arising from them.

The Party indemnifying is called the Insurer, and the party indemnified, the insured, the sum paid the insurer for the risk, the Premium, and the contract containing the stipulation, a Policy of insurance Ibid.

The most general species of Insurance are of the three following kinds. 1st The Marine Insurance including also Bottomry and Respondentia Contracts. 2^d Insurance upon Lives - 3^d Insurance vs loss by fire - Marsh. Ins. 2. All these kinds of insurance are governed by the same general and cardinal Rules.

Marine Insurance is made upon some interest wh the insured has in the ship or goods on board, and indemnifies him from loss or damage from the perils of the sea. and such insurance may be either for a particular voyage, for a certain number of voyages, or for certain period of time.

The most common kind of Insurance is for a particular and single voyage. Marsh Ins. 2.

The utility of this kind of contract, consists in so dividing the loss, (if any) between many, and so that it may fall lightly upon each, rather than heavily upon any one - The Law of Ins, is 1^a a branch of the Marine Law and the Law Merchant is regarded as 2^a branch of the Public Law, i.e. not of any particular state or nation - but of all commercial countries. For the Marine Law and the Law Merchant are founded upon the usages and customs throughout the commercial world. Marsh. 18. 19. 2

There are however particular and local mercantile usages prevailing in different countries and wh, where they prevail, have the force of positive Law.

Hence contracts of Ins made where a particular custom or usage prevails, are construed as if made with reference to that usage, wh usage may be explained and proved by witnesses, like other matters of fact, Doug 492. Marsh. 19. 171. 220. 7. 366. 392. 404. 571. 609. 26.

The Law Merchant as a general Code and of course, the law of insurance, being a branch of the former, is an unwritten Law and is to be found, 1st in the ordinances of different commercial states, 2^d in the treatises of Learned writers on the subject, 3 from the Judicial decisions - *Ibid* - and the Law tho' ^{derived} from the Marine Law is now incorporated with the Municipal Law, or common Law of every commercial state or nation. Marsh. 19. 23.

Who may be Parties. In gen all persons whether aliens or citizens may obtain insurance of their property or may be insured. Thus a Frenchman may have his property insured in this Country. Marsh 30.

But upon the question, whether the insurance of the property of an alien enemy, is legal, and binding, the opinions of Jurists and Statesmen, have been greatly divided. Upon the Continent of Europe, such an insurance is illegal and void Park Ins. 13. 14. 238. 1. Ves 319. 6 Ld 35. Marsh 31. 8.

The whole question appears to have been treated as upon principles of public policy and expediency -

The great preponderance of authority seems to be in favour of restraining such policies as inexpedient -

Indeed this practice of insuring the property of alien enemies, appears to be opposed to be opposed to the general principles of the Law, ~~or~~ viz, that all contracts with

an alien enemy are void. Park 238. Battel Book 3, Chap. 5. Section 76. 10 R 35. 8. 20 548. by the "Jus belli" and J.G. thinks settles the Question.

There have finally been two Statutes in Eng prohibiting the insurance of an alien enemy's property, but as these Statutes 21. Geo 2. 33. Geo 3^d were merely temporary and have expired by their own limitation, the Question, may be said at this day, to be undecided in England. Marsh 30. 31. Park 14.

In this Country we have no law regulating the Question. But admitting that such a policy is legal and binding it is clear that no action can be bro't on the policy by the insured, till after the expiration of the war. Of course the remedy must be delayed. 6 T R 23. 35; Doug 648. 9. note

But there is no doubt that a Neutral tho^{ut} residing in a foreign hostile country and trading there, may insure his property, and even if he be partner with an alien enemy, he may undoubtedly have his interest in the partnership insured. Park 5. Marsh. 10. 38. 439. Doug 648. 9.

It is a general Rule of the C. L. that any individual or private company may insure the property of others. Park 5. Marsh. 10.

In Eng. by Stat 6. Geo 1st the right of insuring by private companies is restricted to two Companies. But the rights of private insurers remain as formerly, and any number of private insurers may underwrite the same policy, proviso, they do as private 6. T R 205. 2 H B 379 Park 5. Marsh 40. 41. We have no such restrictive Stat in this Country and probably never shall have, as it savours too strongly of monopoly for a free government.

What may be insured, Marine insurance is generally made upon ships, goods, and freight. But there are certain articles, wh from reasons of public policy-

cannot be insured. 1st Insurance cannot lawfully be 227
made on any goods to be exported or imported in violation
of the law of this country or the Law of nations. For if policies
of this kind were binding, it wd by supposition tend to
encourage unlawful commerce. Park 236. Marsh 48. 58. 122.
Doug 254 Park 244. Malloy B. 3. C. 7. In Whether the Insurer
is ignorant of the illegality or not. is the same.

Under this Gen Rule, Insurance of contraband goods
are holden to be illegal and void. Now goods are
said to be contraband, where their importation or exportation
is absolutely forbidden Such as the Eng Stat forbidding
the exportation of wool, by wch an insurance on a lot
of wool to be exported, is declared to be void. This -

Is also by the Law of Eng. and most of the European States
the importation of certain enumerated articles, is expressly
forbidden. Now all these articles are contraband goods
within the Rule. Marsh. 57. Park 244.

Where either contraband goods, or goods wh. may be
lawfully imported on the paymt of certain premiums, are
attempted to be imported or exported in violation
of the Law, they are then called smuggled or run goods
and any insurance of such ~~the~~ goods, is illegal and void.
Marsh. 48. 50. Park 232. 244 Malloy B. 2. Ch. 27. Sec. 15.

Whether a trade forbidden by the Laws of one Country only,
may be legally insured in another, is a question, about wh
Jurists disagree.

By the laws of Eng. no regard is paid to the revenues
laws of other Countries. Of course such a policy sh^d be good
there. Most of the European Jurists hold otherwise. That
such a policy is void, and cannot be enforced Doug 238.
Park 237. Marsh. 53. 4. 1.

All warlike stores, ammunition, and arms, are contrabands of war.

They are only so considered in times of war, and such stores when sent to either of the Belligerents, even by a neutral are liable to capture and confiscation, by the Laws of Nations, upon the principle that such conduct is incompatible with a state of Neutrality.

But many other articles are called contrabands of war, such as horses, equipments, Pick. Hemp, Tar, Sails, Cordage, masts, spars, and other necessities for building and equipping ships, are generally regarded as Contraband in time of War.

The consequence is, that an insurance of such articles in time of war is void & cannot be enforced. Vattel B 3 Chap 7 § 112. Marsh 62. 66

Provisions also when sent to a place besieged or blockaded by one of the Belligerents are deemed Contraband. Even sailing to the port after notice of the Blockade is a good cause of capture and confiscation. Hence if no notice. In all other cases however, it is lawful for Neutrals to send provisions to either of the Belligerents Ibid.

Now to prevent the transportation of such contraband articles to either of the Belligerent powers, private Neutral ships are liable to be searched on the high seas, by the Commission ships of those powers and resistance of the Commissioners ^{ships} is good cause of capture and confiscation, by the Laws of Nations. Vattel B. 3. Ch. 7 § 114. 8. 10. 134. Marsh 65. 6.

This is a doctrine w^{ch} this Country has endeavored to resist, tho' hitherto ineffectually 2 Rob. Admiralty 109. 16. 24. 8. 131

Insurance upon any commerce carried on in violation of an embargo lawfully laid, is void of course, by the Laws of the state or nation imposing the embargo. Tho' I trust, such contract shd be or wd be valid in other countries. Marsh 66. § 1. Pl 370. 11. Nov 1729. Park 234. §

Insurance upon goods purchased by one of our own citizens of an alien enemy, in the enemy's country, is illegal, and void.

But whether the purchase of goods of an alien enemy in a Neutral country wd be void, or not. I find no authority or principle and principle, I think it wd not be void.

If this doctrine is denied, the above unless of contraband, appear nugatory. 3 Gould, 8. 5 R 548. Marsh 3. There is one case in Bond P. 445. denying the former part of the Rule.

There are also other rights or interests, wh cannot be insured. Of these are seamen's wages. These cannot be insured from principles of commercial policy, the wages of seamen are lost by the loss of the ship. Now the object of this Rule is to prevent discretion in times of emergency, but were they allowed to insure them the very object of the Rule wd be defeated. 3 Burr 1912. 1 Bl R 594. 7. 5 R 157. 2 N R 208. 10. 294. Marshal 73. 4

Nor can any thing in the ^{nature} ~~name~~ of Seaman's wages be insured lawfully as where a seaman is allowed the privilege of an adventure. This cannot be insured. For this adventure is allowed him by way of compensation or substitution for higher wages. 5 R 157. Mod 74. 5. or Marsh

But a seaman may insure goods, wh he has purchased abroad with his wages. Mor 75.

But the wages of a Ship's master may always be insured for there is a special confidence reposed in him, by the owners, and he is not supposed to need the Pecuniary tie to induce him to stay in the ship as long as is practicable. Ibid at 2. N R 208. 10.

And upon analogous principles, it has been determined, yt a commander of a fortress, may insure the fortress from capture by way of insuring his effects in the fortress. Tho this Privilege wd be denied to the subalterns or soldiers. Mor 75. 3 Burr 1905. 1 Bl R 593. Park 13. Now if there were no other objection to this Rule, than applies to the Ship's master it wd be undoubtedly good. But if the Commander of a fortress were allowed to insure it, he wd be obliged of.

of course, to disclose the strength of the Fort or fortress
Now this disclosed to an insurer might be productive
of the most dangerous consequences

Freight also may be lawfully insured by the Eng and
our Laws. Tho not according to the laws of France. By
Freight is here meant, the hire to be paid by the owners
of the goods shipped on board. Tho freight is often used
to denote the property shipped as well as the premium for
carriage. Strange 127. 51. 3 R. 362. Mor 75. 6. 192. Emerigon
N L. 130. 2 N R. 292. 11 Park 9.

While the slave trade was allowed by law, the Lives of
the slaves might be insured, but such trade being now
forbidden, any insurance of slaves is illegal and void by
the Laws of Eng. and the several U S. Mor 77. 133. 136.
385. 617.

There has been much doubt on the subject, whether
the expected profits of a voyage or of merchandize shipped
can be lawfully insured. It is disallowed in some countries,
particularly France. On the ground, that this insurance
is not to insure vs a loss, but to insure vs a profit.

In England, tho' it has not been determined, y^t profits
"eo nomine" may be insured, yet it has been decided that
an insurance of a ship, goods valued at such a sum, as 100,
being the profits expected by the voyage, is valid, and
this is virtually deciding that the insurance of the expected
profits, is valid. Park 267. Mor 789. 83. 85. 111. 2. N R. 293
312. 325. to 8. Emerigon 39. N. B. and P. 316. 3. Do 75. 3. Caines
245. East 44. Emeri. L N

It has also been decided in y^s State, that an insurance
upon expected profits, is valid. 3 Day 108. profits
But where an ^{insurance} ~~insurance~~ on the expected, is allowed
the ~~insurance~~, ~~as~~ ~~not~~ policy must be a valued one.

and it is not decided, whether an open policy wd be a valid one, For there wd not be any rule to ascertain the damage.

And the rule relating to valued policies has been much questioned of late, on the ground, that if allowed, they wd furnish a method of evading *if* Stat 19. Geo 2^d As gaming policies. Mar 79. 80. 92. 111. 12. 5 TR 709. 2 *Ag* NR 325. 9.

The Interest. It seems on principle to be essential to the contract of insurance, yt the insured shd have an interest of some kind in y subject insured, For it wd be a solecism to say, that he is indemnified from a loss wh cd not possibly happen. As no man can lose that wh he has not. Park 259 2 Vern 269. 10 Mod 77. North 81 97. 1.

At C. L. however, an Insurance wtht any interest in y subject insured, seems to have been lawful. Gaming Contracts were binding at C. L. 2. Vern 269. 10. Mod 77. Com Rb 361. Cowp 553. 8 TR 24. Doug. 30. 31. 301. 2 East 385.

Not only absolute, but ~~more~~ qualified and mere equitable interest may lawfully be insured. If then one person has the Legal and another the equitable interest, both may ^{procure} the property to be insured. As where a ship is mortgaged by A to B. both may have her insured. 1. Bac 487 9. BLR 103. 2 TR 188. 1. Do 745 Park 11. Mod 81.

So where several persons have each a qualified and special ^{legal} interest in y same subject, both may insure to the full value. 2 TR 188. Mor 81. 119. to 121.

The Rule appears to be well settled. yt possession of the subject and a reasonable expectation of future interest, in it, is an insurable interest. Thus where there was a joint capture of prizes by the sea and land forces, the Captors were adjudged to have an insurable interest before the prizes were condemned, and yet before condemnation the property was not changed and after condemnation

They were at the disposal of Govt. 8. 1815. 184
Park 269. Mod 83. 84. 9.

The Trustees of a ship or goods, who are to be disposed of according to instructions, may insure them for y benefit of those who are entitled to y avails. Mor 85 to 90, & 186 13. 3 Det (P); 5. 2 N B 269.

And a Consignee of goods, ^{may} affect an insurance upon them as he has a special interest; a right of possession implies a special interest, and he may insure for the benefit of the Bailor. Det P 315. 2 A R 394. 292 306. 7.

So if goods are consigned to A for B a creditor of A
Consignor. B has an ensurable interest, tho as yet he
has no legal interest title and has no possession of A
goods. 1. B and P 315. Mars 90.

Again a lender on a Bottomry or respondentia Contract has an insurable interest in y subject on wh the loan is made, to y amount of y sum lent.

Boltony.

A Contract of Bottomry, is a loan to the shipmaster or with the owners on the security of the Ship, for marine interest, with a condition, yt if the ship is lost, then the lender is to lose both Principal and interest

4 Respondentia Contract differs from the former in this respect, yt the Loan is made upon the Cargo and not the Ship, and y lender may in either case ensure vs this loss. 2 N^o 294, 6. Park 9, 428. Mars 93.
112. 633. 635.

In these cases, it must appear on the policy itself, y^t the interest is founded on the Bottomry or Respondentia Contract, tho' the insurance be upon the Cargo or ship. This is required to prevent the contract being a disguise for usury or otherwise unlawfully given 3. Burr 1924
1. Bl R 405. Mior 223, 613

But such a lender cannot insure for more than the amount of the sum lent, and the borrower has an insurable interest for the surplus value of the goods over the lent sum, but borrower has no interest in the goods to the amount of the loan, and it is immaterial ^{to him}, so far as regards his immediate ^{interest} ~~on~~ they are lost or not. *Id.* Park 10. 3 Burr

1304. 1. PlRe 399. 405. 22

These policies cannot be underwritten by the borrower himself. For it is only in consideration of his exemption from perils of the sea, yet he is bound to pay the marine interest. Now by underwriting the policy, he had assume the risk, the exemption of ~~not~~ from ~~wh~~ is the only thing that makes the contract valid. Marsh 95. 105. 4.

Wager Policies. is one effected on a subject in ~~wh~~ the the insured has no interest. Such a contract is not an indemnification vs a loss, but a Gaming Contract. It is only a wager depending upon contingent events. Marsh 45. 98. Park 259.

The validity of gaming contracts, or wager policies, has been much contested in our C & Ct. but it is finally decided, that at C & Ct they are valid. Marsh 95. 103. Str 1250. 1. Burr 695. 8 Tr 23. Park 259. 2 East 380.

Certain ~~not~~ regulations prohibit such policies, or such policies are prohibited under certain qualifications by Stat 19. Geo 2^d, by ~~wh~~ many gaming contracts, and wager policies are particularly forbidden.

In Conn all gaming contracts are expressly forbidden as no good policy. by Stat. Park 263. 4. More 123. 5.

Upon a wager policy the insured can never recover for a partial loss, but to entitle him to recover at all there must be a total loss. Hence where such policies are lawful, the words "free from average" are always inserted, that is, the insurer shall be exempted from

from paying for a partial loss, 2 Burr 683. Marsh 97.

Another consequence is ^{it} the Insurer can claim ^{no} benefit from any thing saved, for there may be what is called a total loss, when the goods or part of them are saved, as when the baggage is lost, and hence ~~that~~ the words, "that the Insurer shall ^{have} no benefit of salvage" are inserted in such policies. Mor 97. Park 261.2

An insurance upon one thing in substance, but made to depend upon the fate of another, is a mere Wager Policy. as when an insurance is made upon a cargo of goods, but to depend upon the arrival of the ship.

So if an insurance is effected upon one ship, but depending upon the safe arrival of another, this is a wager policy and void by the Laws of England and U.S. 1. PR 304. Mor 168.9.

In a wager policy, the insured is bound to the same duties, to wh he wd be bound, had he an interest in the subject insured. Hence if the Ship deviates unnecessarily from her proper course and lost, the policy is discharged by this misconduct. 1. PR 304. Mor 308.

And tho insured has an interest in the subject insured, yet if it be very small in comparison with the amount insured, it will be considered as a gaming policy. A small difference however will not vitiate the policy. Cowp 583. 2 Burr 117. Marshall 109.

A Valued Policy is not as such and therefore is not "Prima Facie" a wagering policy. The proper object and effect of a valued policy is to settle the amount of property insured, so as to avoid the necessity and trouble of proving the value at the Trial, in the event of a total loss, and is tantamount

to an agreement among or between the parties that, the property insured shall be deemed of such value.
2 Burr 117. Park 98. 114. Mass 110. 200. 535-

By a valued policy is meant, one in which the value of the property insured is inserted in the policy itself. Still if it appears on trial, that the interest has been greatly overrated, the contract must be either a fraud practiced upon the insurer, or a Wager Contract, and either case it is void. Mod Mor 110. 200. 535. 2 Burr 117.

Where there is a partial loss on a valued policy it has the ^{same} effect as an open one, i.e. as if the value of the property insured were not inserted. For the ^{the} valuation of the whole subject insured, of course where only a part of the property is lost, that must be ascertained, by Ev. as the policy does not decide it. 2 Burr 117. Mor 111. 535. 9. 541. 2. Park 98. 103. %.

It has been much doubted, whether a valued policy on a commission expected by the Insured as Consignee of an expected lot of goods, is not a wager policy. but it is now determined, y^t it is not. Mor 112. Park 268 Emerigon L M 37. N.

Reinsurance. is a contract, between the original insurer and a third person, by which the latter agrees to indemnify the former from the whole or part of the risk, which the assurer has assumed. 112. 2 TR 162. 165. Esp D. 65. Park 267. 280. Morg 2. 112. The effect is to shift the risk from the original insurer on to the second. 2 TR. 162. to 165.

In case of loss, however, ^{the} reinsurer is answerable to the first insurer only. and not to the party originally insured, for he is a stranger to the second contract. Mor 113. And the reinsurer is bound, in the event of

of a loss to the other insurer in the event full according to the terms of the contract, even tho the first insurer had become insolvent and paid only a dividend on his policy. For this contract being originally valid, must take effect according to its terms. *Ibid*

Reinsurance is valid by the C. L. and by the Law of most commercial countries, but having become a method of speculation in the rise and fall of ^{premiums} ~~premiums~~ in England, it was prohibited by Stat except in the case of insolvency, bankruptcy or death of the original insurer. 2 T. 61. Park 277. 8 Marsh 113. 14.

But in either of these cases his representative or Assignee may respectively effect a reinsurance to the amount of the original insurers liability. *Ibid*

There are also two other species of insurance in the nature of reinsurance. 1. d. where the insured himself afterwards procures a reinsurance upon the solvency of his first insurer. The other is where, the Insured makes a second insurance in case of the insolvency of the first insurer. This last, however, is called a double insurance. Park 281. Mars 114, 15.

The first of these modes has not been practiced in Eng or U. S. yet it is valid.

Double insurance is a second insurance effected by the insured, on the same risk, on the same subject; and the object of this proceeding was formerly to obtain double satisfaction in the event of a loss, but it does not now have that effect.

1. Burr 496. 2. Mars 115. And tho' in nature of a wager as to the excess insured over the amount or value of the interest, it is still valid. But Cts of Law, have in effect deprived this sort of insurance of its wagering operation, and both policies are now considered as making but one insurance, and the insured can't now recover

of A and B. A being an enemy's port, is of course unlawful, but ^B being possessed by our allies, in itself considered wd be lawful, but the voyage to the two ports, being one entire act, is illegal in toto and an insurance from the Port of A to B wd be void. 8 T.R. 31. 45. 6. 562. Marsh 126.

Now the result wd be different, if the voyage to A were considered as one entire voyage, and that to B distinct, but where a ship sails to 2 ports before returning, the voyage to both is considered as making one entire voyage.

Risks, as to wh the insured is indemnified w, the most comprehensive is called the "Perils of the sea" Now "perils of the sea" taken in their largest sense, embraces all accidents and misfortunes, to wh ships and goods at sea are liable, from causes wh are beyond human control. It is however for the extraordinary perils for wh the Insurer is answerable, and which no Providence can prevent.

An Insurer is not liable, therefore, for the common wear and tears, tare of the ship, or for any diminutions in her value occasioned by ordinary decay. Marsh. 134. 1. 416. 364 7. Park 61. Comm 56.

The word "Peril" in the last rule denotes not the ^{man's} danger from the disaster happened, but the disaster, itself. The Insurer, then is liable for Tempests, rocks, shoals,

Insurance may be legally effected w all risks incident to sea voyages, under certain exceptions founded on principles of humanity and public policy.

First the Insurer is not liable for any act occasioned by the act or fault of insured, in an illegal traffic. As in smuggling or a Contraband trade, he will not be liable for any loss happening in that sort of trade. Mars 48. 68 120. 2. 132. Doug 254. 0. Park 236. Maloy 2. Ch. 7. s. 17,

Insurance upon lives of slaves, on board of ships, engaged in the slave trade was prohibited by 3 Stat of Geo 3^d. 30. 34. 39 wh forbid this sort of insurance, even before the trade itself was prohibited, and this upon principles of humanity, for if the owners of slaves were secured vs loss by death of their slaves, they wd not have so strong a motive to exercise that humanity to preserve their lives, and comfort the Slaves 6 Fd 65. 6. Mars 134. 6.

What particular Risks within the Policy - The clause of specifying the risks in a common policy, appears sufficiently comprehensive to embrace every species of risks, to wh Ships and goods are exposed from the Perils of Per voyages. Mars 714. 716. 137. 711. 12. Maloy B 2. Ch 7. § 7.

But a common policy usually contains what is called the common memorandum, and there has been great diversity of opinion among eminent jurists, as to the construction to be put upon this clause

This Memorandum, is in the form of a Warranty by the Insured and is annexed to the policy. It runs thus, "Corn. Fish. Flour, &c are warranted free from average, unless general, or the ship be stranded."

These articles are excepted out of the general terms of the Policy, on account of their perishable nature."

This may well be called an ambiguous sentence, The word, "Average" is here used in a twofold sense, tho' mentioned but once in the clause, and signifies not a partial loss only, as contradistinguished from a total loss, but also a contribution made by the owners of y ship, freight and Cargo, for any particular loss sustained by any individual for the general safety of the ship and Cargo.

Thus if the goods of A are thrown overboard in a gale

to save the ship, the owners of the ship and Cargo are bound to contribute towards his loss, and this is called a general average.

If there be no stranding in the case, the insurers under this memorandum are not liable for any partial loss, on these specified articles, unless it occasions a general average i.e. a contribution, by all the parties, who have any interest in the ship or cargo 3 Burr 1555. 4 Dk 787 Morshal 144.8. 460.2

Further the underwriters under the clause are not bound to pay for any partial loss upon the enumerated articles, unless the Average be general or the ship be stranded, and the great question, has been "whether, the words or "the ship be stranded" amount only to an exception, or whether they are ~~except~~ conditions. i.e. an the Insurer is exempt from every partial loss on these articles, except the loss is occasioned by the Stranding or whether they are liable at all events, if there be a stranding, whether it occasioned the loss or not.

Mar 139. to 155. § 2 Dk. 216. 4 Dk 783. 1. 130

Ld Mansfield, was of the former opinion, that these words amounted only to an exception and that the insurer was not liable, unless the loss were actually occasioned by the stranding. But according to others, among whom is Ld Kenyon the latter opinion is correct, i.e. that it is a condition, and of course, that the Insurer is liable at all events, if the vessel be stranded, On the ground that these articles are peculiarly liable to decay, and frequently sustain damage, where it wd be impossible to ascertain the precise cause. Therefore this condition is tantamount to a precise agreement among, or between the parties - According to this latter construction, the Insurers notwithstanding this clause, are liable for partial losses whatever may have been the cause of the loss, proviso there has been a general contribution, or if the

or if the ship is stranded, and if neither of these events have occurred, then the underwriters will be liable only for a total loss. 1 Est. R 416, Mars 139. 155.

Suppose a partial loss has been sustained before the ship is stranded,

There are some losses and injuries not arising from the perils of the sea, but wh are imputable to the master or owners of the ship, and for wh the ~~master~~ ^{master and} owners, ~~and~~ ^{are liable} ~~not~~ the underwriters are ~~not~~ liable to the freighters.

Thus if any loss or damage is occasioned by any latent defect in the ship, before she sailed. For such losses, the owners are liable and not underwriters. For in such contracts there is an implied warranty on the part of the insured, that the ship is seaworthy, and if it is not, the Insurance is void.

In this case, it makes no difference whether the insurance be on the ship or the Cargo, it is void in both cases. There is however, ^{the same} ~~an~~ implied warranty, to the insured, so that he obtain satisfaction from the owners, tho' he may not resort to the insurer. Park R 220. 1. 231. Doug 708. Mars 156. 364. 372.

Where the loss is occasioned by the unworthiness of the ship as between the insurer and insured, it is the fault of the latter but in the last resort it is the fault of the owners. Indeed the owners and Master are liable as common carriers, to the freighters for all losses.

Exception, first, such as happen by the act of God or inevitable accidents, and these are called the perils of the sea. 2^d those occasioned by the public enemies, 3^d by act of the party insured or his default.

last

In the ~~last~~ case of of these no one is liable, for if his goods sustain damage by his own act or neglect, he cannot recover satisfaction of any one. In the 2 first cases, the underwriters are liable, they

being properly "Perils of the sea", 1. ^{Peril} Batt 190. 238. Raymō 220.
 Mars 137. 159. 6. TR 651. La Raymō 918. Jones on Bailmō 152.

It follows that simple theft committed ^{by those} on board of the ship, is not regarded as a Peril of the sea, but attributed to the want of proper vigilance and care in the master in not selecting proper mariners, or admitting rogues on board, and for all such losses, they are liable. Mars. 157. 8. Park 245.

Still in common policies there is an insurance vs thieves but this is construed to mean from without, as Pirates, and not those on board, the ship. Park 25. Mars. 158.

Park 24. 5. ^{by domestic foes}
 But from loss by common robbery from without, both the owners and insurers are liable to the freighters, but ^{the} insurers are subjected by the insured, they may recover satisfaction from the owners, in an action bro't in the name of the Freighters, For the liability of the underwriters is only secondary, while that of the owners, is primary 4 TR 783. Park 25. Marsh 148. 58. 61.

- If goods to be shipped are delivered to the Master on shore, he is as answerable for them as if they were on board, So also where they are in boats or barges to be carried to the ship, he is liable. So again at the end of the voyage, they are yet at his own risk, till they are landed. Mars 159.

There are 2 Eng Statutes limiting the liability of the owners. 7. Geo 2^d. Chap 15. 26. Geo. Third Chit. 68. But with these we have nothing do. 1. TR 1878.

Duration of the Risk. In order to subject the insurers the loss must have happened, in the course of the voyage, and during the continuance of the Risk insured vs Mars 161. 615.

Every voyage must also have a definite commencement.

otherwise it cd. not be ascertained where the voyage begins. Thus where the time is limited, the two extremes of that, are regarded as the beginning of the voyage and also the end. And if a ship is insured both outward and homeward, for one entire Premium, the passage to and from are regarded as parts of one entire voyage. Mars 161. 615.

As a general Rule, the risk on goods does not begin, till they are on board, So that if they are landed at the port of discharge, or if they are put on board of another ship, without the insurers knowledge, or consent, the contract is at an end; and the insurer is discharged as to all subsequent risks. Beginning from the loading, continuing until they are unloaded.

But if the Ship becomes disabled during the voyage, so that she cannot safely proceed and for this reason, the goods are put on board of another ship, then the risk continues on board of the latter ship, and this Rule is well established. It must however be done in cases of absolute necessity only. 1 Burr 351. Strange 1248. 1 Str 61. Mars 162. 220. 374. 6. 221. Malcy B 2. Ch. 7. Sec 11.

Where the insurance is upon the goods to be delivered at a certain place, the risk continues until they are so delivered. So that if any damage or loss happens to them in the boats before delivery, the insurer is liable for the loss. 1 Burr 348. Mars 163.

And the goods are also protected by the policy during their conveyance from the ship, in boats or lighters, to any ^{part of the} port of delivery, provided it is customary to deliver goods at that port, or that part of the port. Marshal 164. 5. 7 Park 23. 2 Str 1236

Where after a ship's arrival at the port of discharge, the goods are sold without unloading, and the buyer of them, contracts with the master, to deliver them at another port,

and a loss happens, before she breaks ground, or sails for the other port, the Insurers are discharged from all liability to pay the loss. Marsh 109. 7. 4 PR 206. Park 41. 50.

Marsh 170.

on a ship

The commencement of the risk, varies according to the terms of the contract. If the time is limited by the policy, the risk commences at the time, tho' the ship shd be on a voyage.

But if a ship be insured from the Port of A, and a loss happens, before she breaks ground, the underwriters are not liable, for under this phraseology, the risk does not begin untill she sails. But if the Insurance be "at and from the port of A, there the risk begins at the time of writing the policy, unless some other time is appointed by the policy at wh it shall commence. This Rule supposes the ship to be in the Port of A at the time. Coarb 601. Marsh 173.

If a ship is expected to arrive at the Port of A, and is insured at and from that port, the risk attaches at the moment of her arrival at the port of A and not before. Marsh 173.

And where the insurance is "at and from one port the risk continues as long as the ship is preparing for the voyage, unless the voyage is suspended, and the ship is suffered to remain in port an unreasonable time, without the shipowners consent; there the insurers will not be liable for a loss, after a reasonable time has elapsed, but if the ship is decayed and the voyage suspended by the fault of the Master only, without the consent of the owners, the underwriters will still be liable. Marsh 173.

In the common policy upon a ship, the insurance is made to continue only for 24 hours, after she is moored in safety at the Port of discharge, Marsh 173.6 and this rule holds, even tho' the cause of loss, did in fact exist before her arrival, and if no actual loss happens, till after she

has been in port 24 hours, the insurers are discharged. 1. T.R. 252. Mars 174. 5. 456. 4. 677. Park 23. 35. Phiner. 243.

And if a ship is insured for a limited time, as for one year, and receives what is called her "deathwound" during the year, yet if she survives the injury, for the time limited, tho she shd afterwards be lost in consequence of that injury, yet the Underwriters are discharged. 1. T.R. 260. 252.

Park 31. Mars 677. 474.

But where the risk is thus limited to 24 hours, if during that time, she is obliged from necessity to leave her mooring, the risk continues. For she is then drawn out by one of the perils insured vs.

So if after she is come to anchor in the port of discharge, and before the time has expired, she is ordered off to Quarantine, the risk then continues. Strang 1284. Mars 175. 6.

And if she is merely ordered to perform Quarantine, within that time, tho she don't break ground, untill the 24 hours are expired, the risk continues. For she cannot be said to be moored in safety, as that implies a right to unload, but the ship being ordered, off to Quarantine, the Master has no right to break bulk.

And the Rule is the same, if the ship is seized within the 24 hours. Peaks R. 211. Mars 167. 176. 7.

But if the ship is insured in general terms, from A to B, witht any words limiting the risk; it has been holden, that risk continues untill she is unloaded, and the cargo discharged. Skin 243. Mars 177. 1. B.R. Bl.R. 417. 18.

But it is decided, that this rule may be varied according to the general usages of trade. So that if the general usage be, that the risk continues 24, or otherwise, that usage will decide the question. 1. Bl.R. 417. 18.

If a ship is insured on

a voyage generally, to an island, where there are a number of ports, without designating any particular port, the Rule is, that the Port at wh she arrives, for the purpose of un-loading, shall be deemed the port of delivery; and if the Captain shd change his mind and sail to another port, the insurers are not liable for any loss or damage, that may occur, after she breaks ground for that port. 1. Bl R 417, 1. Esp R 415, Park 39, Mars 178.9.

The risk upon the rigging, tackle, furniture and provisions of a ship insured, as a general rule, continues no longer, than the things are on board, or attached to the ship. So that if any of these articles are put on shore or put on shore or removed from the ship, except when necessary, to remove them from the ship, while repairing her, the risk is at an end. But if this necessity occurs, the risk still continues, for these repairs are for the benefit of all concerned in the ship, as well for the underwriters as for the owners, 1. Burr 341, 4. TR 206, Mars 180.2.

A Liberty in a policy (as is usual) to touch at any ports or places, means only those ports and places, that ^{are} in the usual course of the voyage, and the master is not at liberty in this policy, to touch at ports out of the usual course, Doug 271. Mars 187.6. 389.99. 3 Burr 1707. 1. Burr 348.

Park 41.

But the construction of this clause may also be varied by the general usage of trade. 3 Burr 1707. 1. Do 348, Park 41.

And a liberty to stop and touch at any port, during the voyage, does not authorise the insured to break bulk, it means only a liberty to stop, and tarry for some object that is necessary, during the voyage, as to take in water or provisions and does not authorise any change in the destination of the adventure 1. Esp R 610, Marsh 187. 1. Del P 310.

She must touch at the ports in the order of the voyage.

In an insurance upon freight, i.e. the price paid by the freighters

for the transportation of goods, the Risk risk in general begins from the time, the goods are put on board, and, or shipped and not before that time.

Hence if any previous accident occurs, wh prevents the ship from sailing with the cargo, the insurers are ^{not} liable for any loss of freight, the ship cd have earned, if the accident had not happened. For the ship does not begin to earn the freight, till she has broke ground, 2 Str 1251. Mars 76. 192.

But if part of the cargo was shipped and the rest was ready, the insured upon a valued policy may recover for the whole freight. 3 TR. 362. Mars. 92. 176.

If the ship is to sail to a distant port, to take in the cargo, the risk upon the freight when insured, begins at the time, the ship sails for that port, 6 TR 478.

If after the insurance is effected, the nature of the risk is changed, by the insured, witht the consent of the insurer, the contract is destroyed and the underwriters discharged. For they cannot be made liable for any risks, wh they did not intend to insure vs.

Thus if a ship ^{engage} is insured as a private trader and she afterwards takes letters of Marque, the insurer is not liable, even tho no use shd be made of the letters of Marque, For the risk contemplated by the Insurer, was that of a private Trader and taking out letters of Marque, alters the Risk, and increases the hazard, TR 580. Mars 183.4 Because they furnish temptation to cruise, and thus increase the risk.

Indeed such a change in the risk, is in effect, always a fraud practiced upon the insurer, whether it be so designed by the insured or not. If however the letters of Marque are void in law, for want of sufficient requisites and were taken out witht any intention of cruising for prizes,

248-
but solely to furnish additional inducement to seamen to ship on board, the insurer is still liable, for in this case no fraud is practiced upon him. 6 The 397 Marsh 195.7

A Policy of insurance is a written instrument containing the contract between the insurer and insured. The word policy is derived from the Latin and signifies a note or bill. So that a policy of insurance means nothing more than a bill or contract of insurance. Mars 198.9. Italian.

In general this contract is signed by the insurer, or insurer's alone. For as the Premium is paid or suppose to be paid at the time of granting the policy, there is no need of a counter agreement on the part of the insured, to pay the premium for insurance. Ibid et Appendix 12.3.

An interest policy is where the insured has a real, substantial interest in the property insured, and this what distinguishes such a policy from a wager policy. The latter being founded upon some ideal risk, where the insured has no interest whatever in the thing insured. Park 258.9. 60.2 Bern 269. 296. 716. Mars 81.97. 199.

Wager Policies generally have the words "interest or no interest" or what are equivalents, with "further proof of interest", than the policy. Now these words are inserted in these policies to exonerate the Plaintiff from the necessity of proving interest in the property, for without this clause he could not unless he did prove an actual interest.

In reference to the amount of interest, where there is any interest, policies are either open or valued. A valued Policy contains a valuation of the property insured, and that valuation is independent of the Stat vs Wagering policies and binds the parties.

An open policy is one, where there is no

valuation of the property, so that its value must be proved on trial, in the event of a loss. *Mars 199. 2. Burr 1171. 2 Bern 716.*

And this valuation ought to be fixed according to the cargo & the true value of the property, or thing insured at the time he valued at the effecting the insurance. *Ibid* it costs, not value.

At C. L. upon a valued policy, the insured was not bound to prove any interest whatever, but he might recover according to the valuation in case of a total loss. But now under Stat Geo 2^d the insured must prove some interest in the subject of insurance, to show that it is not a mere Wager Policy and the valuation intended as an evasion of the Stat as gaming policies. *Ibid* Aue.

It is obvious yet notwithstanding this Stat, the policy may in a great degree be a Wager Policy: for by this Stat the insured is only required to prove some interest, consequently the interest may be greatly disproportioned to the valuation.

But tho' the insured is not bound to prove any more than a partial interest, yet this, I conceive, does not prevent the insurers from proving that the interest was greatly disproportioned to the amount insured, so that 'tis in fact a Wager Policy and an evasion of the Statute.

Bern 716.

Since the above Stat, then, the valuation in Eng can only be *prima facie* evi, and the insurers are still allowed to prove, that the valuation is only an evasion of the Statute, vs Wager Policies. *2 Burr 1171. Mars 110. 201. 532. 103. 105. 2 Bern 716.*

Still when a valued Policy is honestly intended, it will not enquire very minutely into the valuation of the property and will not allow the insurer to avoid the policy for a trivial excess but only where the disparity is excessive and enormous. *Marshall 202.2.*

In mercantile towns insurances are generally effected by Policy Brokers, witht any direct communication between the insurers and insured, and in such cases the broker is the person liable to the Insured for the Premium, and the Broker alone can recover the premium of the insured in order to indemnify himself Mars 203.4.2.

In case of a loss however, the Insured is the only person who can maintain an action on the Policy Ibid. And to constitute an agent for the purpose of making an insurance, a person must have express directions to that effect from his Principal, or must be under an obligation to insure arising from the nature of his dealings with the Principal

Hence no general authority relating to another's ship or goods, can make one an agent to effect an insurance. Thus a Ship master or Captain has no such authority to insure for the owners, 5 Burr 272; 1. B. & P 316. Mor 205. 18

There are however three cases in w^h a person may be bound to procure insurance for another, and may be liable in an action on the case, if he neglects to do it, and a loss happens.

First if a merchant abroad had effects in the hands of his correspondent here, the foreign merchant has a right to require his correspondent here to effect an insurance upon those effects; and his correspondent is bound by such directions; tho' he made no agreement to procure an insurance upon the goods; for the foreign merchant has the power to determine the appropriations of his effects, as he pleases.

Second. When there are no such effects of the foreign merchant in the hands of his correspondent here; yet if he has been in the habit of executing insurances for him, he is bound to comply with directions ordering him to procure such insurance, unless he has given previous notice, y^t he wd not procure any more insurances on his account.

251.

The principle is, that the fact, that the correspondent has been in the habit of executing such insurances, implies a promise, that he will continue to do so, unless he gives notice to the contrary.

Third. Where a foreign merchant sends a bill of lading to his correspondent here, and orders him to insure the same as a condition of his accepting the same, His acceptance of the Bill of Lading implies an engagement to insure, and if he does not effect an insurance as directed, he will then be liable in the event of a loss. 2 TR 128. 1 Do 22. Mars 205. 6. Park 304. 1 TR 22.

And if a Merchant in any of these cases, having accepted an order to insure from abroad, limits the Broker, or Insurer to too small a premium, so that insurance can't be effected, and a loss happens on the goods, he will be liable for that loss, as if he had not attempted to insure the goods. If however he offers the usual premium and fails to procure an insurance he will not be liable, Ibid.

If the correspondent agrees voluntarily to insure, and by his ignorance, for This depends upon the same principle, as governs in of accomplishing the law of Bailments, when one voluntarily undertakes his office. He is to manage the property of another, and by his neglect, or unskilfulness the property is lost, or injured, he is liable over to the Bailor or owner. 1 Esp 74. Marsh 266. 7. 1 TR 158.

On the other hand any fraud practiced by the agent upon the insurer, will avoid the policy, even tho' the insured was not privy to it, or has given express orders to the contrary. For where either he or the insurer is to, or must suffer by the fraud, it will be considered, the fault of him, whose agent committed the fraud, and this upon that broad elementary principle of the law that where one of two innocent persons must suffer by the acts of a third, he who enabled that third person

to occasion the loss, must suffer it. 1 T.R. 12. Mass 208. 340, 350. Park 209. 2 T.R. 70.

In all these cases, the agent is liable to the same amount in the event of the loss, as might have been recovered by the insurers in an action on the policy, provided a valued policy had been effected, and of course he may avail himself of any defence, which the underwriters of a good policy would have had in the same situation. For the liability of the Agent is only a substitute for that of the underwriters. 7 T.R. 157. Mass 74. 209. Park 313.

If any person wrongfully detains a policy from the insured, he may maintain trover vs the persons detaining it. And in this action of Trover, the insured may prove his loss as in an action upon the policy, and recover the same amount, as he might on the Policy in an action vs the insurer. The loss sustained being the only rule of damages. Mass. 211. Park 4. 4. Mass 210.

If a Broker represents to his principal, that he has effected an insurance, when in fact he has not, the Principal may maintain trover vs the Broker for the policy, and upon proof of loss he may recover the same amount of the Broker, as he might have recovered of the insurer, had a policy been effected. Park 4. Mass 210.

The reason is, that as the broker has made this representation, he will not afterwards be permitted to shew, that no policy in fact was effected, and the Ct and Jury are bound to believe, that there was a policy according to his representation. This

The established form of the common policy is very in-artificial, but it is always construed liberally, and beneficially, for the insured, so as to effect ^{the indemnity} intended by the contract. and according to the usages of trade where it is effected. Upon the same principle, as the "Lex Loci Contractus" governs in other contracts. 4 T.R. 210. 1. Burr 345. Mass 24 or 211. Doug 251. Obscure clauses construed according to the Rules of C. & L.

First. The name of the insured, of his Agent, or Trustee must be inserted in the policy, when it is executed. The Rule formerly was, to execute the Policy, having it blank as to the name of the Insured, to be afterwards filled up. The better Rule is a Statute regulation. Mars 213, 1. Bet. P. 321. 552. 1. St. B. 313. Park 17. These Statutes are the 25th and 28. of Geo Third, Mars 214. 19.

But as by the C. L. the name of the Insured must be left Blank and as the Statutes have no weight with us, it is presumable that such a policy wd be considered good in this Country.

Second. In a policy, ^{even} on goods, it is in general necessary to name the ship, in wh they are to be transported. For the risk might be essentially altered.

And where the name of the ship is inserted, it then becomes part of the Contract itself, yet they shall be shipped on board the ship only; and another ship cannot be substituted by the Insured without the consent of the insurer, unless in cases of necessity. St. 1248. St. B. 611. 1. Bum 351. Mars 160. 2. 220 374. 379. 656.

There are cases in wh the ship need not be named, as where goods are to be shipped from abroad in any ship, that may offer, and an insurance is effected on those goods here, it is usual to insert the words, "on any ship or ships" and this practice is in such cases sanctioned both by usage and authority. 2 St. B. 343. Park 19. Mars 221. 379. 383.

The species of vessels in wh the goods are to be transported ought also to be described, as Brig. Ship. Schooner, and if it be not correctly described, so as to mislead the Insurer the policy is void. If however a misdescription happens by mistake, and does not appear to have effected the risk, or if the ship actually employed, was known to the insurer, the contract will still bind him in the event of a loss. Marsh 221.

If the vessel employed is a Privateer, it must be so described for the risk of a privateer is essentially different from that of a private trader. And if the vessel is a letter of Marque it is said to be prudent to describe particularly and on principle, I should think, ~~or~~ suppose such a description to be indispensable to the validity of the Policy.

At any rate if the fact, that the ship is a letter of Marque is concealed, and she is captured in a pursuit wh she might have avoided, the insurers will be discharged, *Mass 221.*

I think, that a letter of Marque ought to be denoted, in the policy - In general the name also of the ship's master must be inserted and if there is no clause authorizing the insured to substitute another, no other person can be substituted without consent of the Insurers except in cases of necessity. *Ibid.*

It is usual to insert after the Master's name, these words "or whoever else shall go as Master" but these words do not warrant any wanton change and even in this case, the master may not be changed without the consent of the insurers unless in cases of necessity. *Ibid.*

Third. The subject matter insured must also be specified in the policy, as ships, goods, freight &c. But if the policy is on goods, it is not necessary to particularize what species of goods, and the general words, "any kind of goods or merchandise" is sufficient. *Ibid.*

The particular species of goods are sometimes at the foot of the policy, when the description in the body of the Instrument is general; and where a particular description is thus added at the foot of the Policy, it is considered as a part of the contract, and if goods are put on board not answering to this description, they will not be protected by the general words in the body of the Instrument. *Ibid.*

If Respondentia, or Bottomry securities are insured, they

must be particularly described in the policy, and cannot be included under a general description, or denomination of goods. For as insurances upon this species of securities has led to Gaming Policies, the Os will require a particular description. 3 Bur-1394, 1 Bl R 399, 405, 422

Usage however, may (it is said) create an exception to this Rule; as if it be customary in the Contract Country where the contract is made to include Respondentia and Bottomry securities under the denomination of goods. That usage will govern the Question Mass. 495, 225. Park 11 Mass 94.5.

Masters clothes and ships provisions are not comprehended under the denomination of goods. But if the Master wishes to insure them, he must describe them particularly in the Policy, and the same rule holds of goods lashed upon deck, as they are exposed to greater dangers and further if they are intended to be protected by the policy, they must be specifically named. Mass 225. 627. Park 20.

Money, Jewels and Bullion may be insured under the general denomination of goods. In its most comprehensive sense the words "goods" includes all moveables, and these are all moveable chattels. The rule is otherwise in the construction of Penal Statutes. 4 Bacon 19. 66. Park 22.

This rule supposes, however, yt those articles are a part of the cargo. But on the other hand, Jewels, Watches, Trinket Rings, worn about the person, are not included under the denomination of "goods" and if intended to be covered by the policy, they must be specifically named. Maloy B 2. Ch. 7. Ins 18. Mass 226. 466. 2 Tr 407.

An insurance on the ship covers no part of the cargo and the cargo may be lost, and the owners will have no indemnity vs the insurers of the ship. Maloy B 2. Ch. 7. Ins 18. Marshal 226. Maloy B 2. Ch. 6. Peton 4

Fourth.

Description of the Voyage,
with the commencement and end of the Risk,
The voyage insured (where a voyage and not a certain period of time is insured) must be truly described. If the Policy must contain, the time and place, at which the risk must begin and end, and also the place of the ship's departure, as well as the place of her destination; and if a Blank be left for the place of either the ship's departure or destination, the policy will be void for uncertainty. 1. HBL 463, Doug 16, Mars 227, 8, 9.

If the place of destination is falsely described, the contract is void *ab initio*. Thus if a voyage projected from A to B, is described as a voyage from B to C, this policy is void, and tho' the ship is lost before she reaches the dividing point, where the tracks to the two different ports diverge, yet the policy will be void, because it was so *ab initio*. 2 LK 32, Doug 16, 346. Park 299.

And whatever may have been the original intentions of the insured, at the time of effecting the policy; if the ship does in fact sail on a voyage different from the voyage described in the policy, the insurers are discharged.

Hence if a policy is effected on a voyage from N^y to Lisbon, and the ship actually sails to Cadiz, the policy is void from the time she starts from the course to go to go from Lisbon. 2 LK 30, Mars 230, 1. Doug 16, 346.

Park 249, Mars 222.

But where there is only an intention to deviate from the voyage, that intention not being executed, the policy is not discharged. In this case, it must be particularly observed that the "Termin" of the voyage actually intended, must be the same as that described in the policy. 2 HBL 343, 3 East 572, 5 LK 581, Mars 232, 1. 237. Note. J. al 444.

There has been great difficulty in settling distinctions

between actual deviation, an intended deviation and a different voyage, and these distinctions appear never to have been definitely settled till the time of Ed. Mansfield. They are the following

First. A deviation from a voyage is a voluntary departure from the usual course of the voyage insured; not in consequence of any previous orders given to the Captain by the Insured; but from a design conceived during the voyage after the ship has sailed. This is what is called a Departure.

Second. If the departure from the usual course, was in consequence of prior orders, given to the Captain before sailing. It wd then be different voyage, and not a departure from a former one.

Third. An intended departure is a design conceived by the Captain during the way, but not carried into effect.

The owners insure a voyage from A to B, and the vessel actually sails from the port of A to B. The captain determines to touch at C, and does actually deviate from the course to B, in order to touch at C. Now this deviation avoids the policy from the time of the departure from the direct course, for the port of C, and the insurers are discharged from all subsequent responsibility.

On the other hand, if the ship sails as before, and the Captain determines to touch at the port of C, but before he reaches the diverging point, the ship is lost, the insurers are still liable. For the execution purpose of the Captain will not of itself vacate the policy.

But if the ship is insured from A to B, and before she sails, the ship owners determine on a different voyage, and the ship sails in pursuance of that subsequent determination, the policy is void from the time. Doug 18 Mass 232, 392, 97, 594, 655.

If a policy gives 'a ship the liberty to touch at a place, where it was not originally intended, that she even should touch, this will not avoid the policy. For not touching at that port, will diminish the risk, as it shortens the voyage and of course is favourable to the Insurer. Doug 238 Mars 232.

If from a certain point in the ocean, there are several tracks, of wh the Capt usually elects, wh he will pursue, according to his discretion; but the insured before sailing directs wh course he shall pursue, the policy will be void, "ab initio", unless the particular track pointed out in the policy itself, ~~be altered~~

For the insurer is entitled to the judgment of the Capt in electing wh of the tracks he will pursue, when he reaches at the first deciding point, and this may often be a point of considerable consequence. Mars 233. 6. 7. F.R. 162.

Art. 5th

Perils insured against.

The perils vs wh the insured is to be protected, must also be distinctly enumerated in the Policy and the common policy contains all the perils intended to be insured vs. Mars 236. F. Appa 714 to 716

For losses imputable to the owners of the ship, we have already seen that the Insurers are not liable. Page.

Where a ship already afloat is insured, the words "lost or not lost" are inserted. By these words the insurer is rendered liable not only for all future losses, but also for such as may have already occurred in the course of the voyage, and if it should be proved on trial, that there had been a loss, and even a total loss before the policy was executed, the Insurers under this clause will be liable for that loss, unless it was previously known to the insured. In that case, they wd not be liable, as it wd be a fraud upon the part of the

Insured, Mars 237 Park 25.

-58.

Sixth, Powers of the Insured in case of Misfortune
To obviate doubts it is usual to insert a clause empowering the insured in case of disaster, to use all necessary means for the defence and recovery of the property insured, and in all such cases the defence to be defrayed by the Insurers, by a contribution in proportion to the amount of their several subscriptions Mars 239. 712, 714.

Seventh The policy regularly contains an acknowledgment of the receipt of the Premium, whether it has actually been paid or not, and this acknowledgment is intended to preclude all possible objections for the alleged want of consideration. In large commercial towns, the premium is not usually paid at the time, but it is a matter of account between the Broker and Insurer. But notwithstanding this acknowledgment of payment, yet if the premium is not actually paid, the insurer may recover it in an action of Assumpsit, and the acknowledgment is no bar of payment, as the Ct and Jury will take notice, that it was made "pro forma" only. Mars 339. 46, Carth 338.

Mars 239. 40

The amount of the premium is not fixed by any Rule, whatever but must always depend upon the agreement of the parties, it is no matter how large, or how small the Premium may be, proviso, there is no fraud in the transaction. If however the premium was diminished by false representation on the part of the insured, it will then be void. Mars 140.

The eighth requisite to a policy is the common memorandum which exempts the insurer from any partial loss, on certain enumerated articles, and unless there be a "general average or the ship be stranded" Page ante. Mars 712. 1415. 338 155. 6.

1. Dr 323.

The ninth requisite is the signature of the insurer or insurers. To the signature of the insured is usually annexed, the

sum for wh he insures as 1,000 £. and there may be any number of insurers. The annexation of the sum implies an engagement to pay the amount in the event of a loss. But it is not indispensably necessary, that the sum for wh each insurer binds himself, shd be specified in the policy, as he may bind himself to pay any fractional part in the event of a loss. as $\frac{1}{8}$. $\frac{1}{4}$. Marsh 241.

10¹⁵

No date is inserted in the body of the policy. The Policy itself has not and ought not to have any date, but as each subscription makes a distinct contract by itself, each underwriter sets down the date of his own subscription Mars 241.

A policy is always denominated in the Law, to be a simple contract, because it is never under seal, but this is referred to a policy executed by individuals, but where it is executed by a corporation, it always of course under the seal of the Corporation. and is then a deed.

But where considered as a Simple contract not under seal, it cannot be altered or corrected by Parol Evi, except for mistakes or fraud clearly made out. However, if there be any fraud, a Ct of Law or Equity may set it aside, and if there be any mistake a Ct of Equity will correct on a bill filed for that purpose.

The difference between the jurisdiction of the two Cts is, that a Ct of Equity may alter it for a mistake or set it aside wholly ~~aside~~ ^{wholly} for a fraud. A Ct of Law may also set it aside for a fraud, but cannot alter or correct any mistake. 1. Ves 317. Mars 244. 6. 5. 1. Atkins 545. Trin 454.

In Marshal there is this expression, 'that for a mistake clearly made out, a Ct of Equity and perhaps a Ct of Law, will correct the policy. But I don't see, how a Ct of Law can in any case alter the instrument for a mistake. Pothol 444. where he

says, that a policy was once varied in a Ct of Law by Parol Evid, as he cites the case, it was contended, that the risk in the policy was not in fact the risk contemplated by the parties. *Ld Holt* however was mistaken. *Thorn 424*, *Mars 247*, 608.9. *Salk 444*, *Salk 444*,

The Warranty.

This is a stipulation on the part of the insured, in the nature of a condition precedent. and the warranty may be either affirmative or promissory. Affirmative where it alleges the existence of some previously existing fact, as that the ship is neutral property, or that the ship sailed before a given day. *Cowp 784.5.8*. *Doug 11. N. 37*, *3 T R 705. 4* *Mod 60*.

The warranty is promissory, where the Insured undertakes the performance of something future, as that the ship shd depart with Convoy. *Cowp 784.5.8*. *Doug 11. N. 37*, *3 T R 705. 4* *Mod 60*. There is this characteristic difference, between an affirmative and promissory warranty. If an affirmative warranty is false, the contract is void "ab initio" for if false, it must necessarily have been so at the time of executing the Contract. But a promissory warranty is violated by the non-performance, and it is subsequent violation, that avoids the policy, and it is void from the time and not before. In one case, then, the contract is void "ab initio"; in the other defeasible on some future event. *Mars 287*. *Park 177*. 350. *Doug 705*. 3 T R 477.

A warranty may be either express or implied. Express, when contained in the Policy, and implied when it arises from the nature of the agreement and is not expressed in terms, as that the ship be seaworthy. Now this warranty is implied in every case. *Mars 247*.

An express warranty is to be construed according to its commercial import, that is, according to the understanding of Merchants. *Mars 249*. And this express warranty must be literally complied with, and if not the whole contract is void. For in the case of a warranty, the meaning of the parties.

is, that if it be not complied with, the policy shall not be binding. 1 L.R. 345. Park 393. Colv 784. 5. 8. 7. L.R. 705. And it is quite immaterial for what purpose, the warranty was made, or whether it is, or is not beneficial to the parties. For the Cts will not enforce an original contract if it be altogether frivolous. Yet where it is made a condition president they will require a literal performance.

Park 218.

And further it is wholly immaterial, whether the loss was or was not the consequence of the breach of the Warranty, and tho' it shd proceed from other causes. 1 L.R. 343. 5. 8. John. 1 Park 319. Mars 250. 5. 1. 5

In an insurance on a voyage, both outward, and homeward the insured warranted, the insured warranted that the ship shd have 50 hands on her outward passage, without specifying any number for her homeward passage, and the ship sailed with 49 hands only and arrived in the foreign port in safety, but was lost in her homeward passage, the Insurers were discharged, because she did not comply with the condition president. 1 L.R. 343. Cowp 607. 6. 784.

8 John 1.

The Rule is the same, to whatever cause the noncompliance of Warranty is attributed. Cowp 606. 7. 784. Park 320. 26. Mars 250. 1. 5.

8 Johns 1.

Every Express Warranty must appear on the face of the policy itself. A collateral parol agreement in the nature of a warranty, and any thing in the form of a Warranty in another paper, as in the instructions of the Capt will have no effect. It is sufficient, however, if it appear in the margin of the Policy, as that is considered a part of the policy, but it may not be in another paper. Park. 322. 3. Cowper Cowper 792. Doug 12. N. 371. 2 L.R. 343. Marsh 252. 336. 7. 8 John 1. Park 331.

But, printed proposals by the insurers, referred to in the

policy, and prescribing the conditions, on wh the insurance must be made, are then deemed a part of the policy and become a condition precedent to the insured's right or recovery.

For where the policy refers to printed proposals for the conditions of the Insurance, that reference makes the proposals, a part of the policy for the purposes of construction, and the insured is bound to know the conditions referred to in his policy—

1. H. B. 254. 2. do 577. 4. 6 L. R. 716. ~~81~~. Mars 253.

This is a Rule common to all contracts Cowp 784. 661. or 601. 1. H. B. 254. 2. do 574. 7. n. 6 L. R. 701. or 710.

A warranty in common use, is that the ship insured or whose cargo is insured, shall sail or have sailed, on or before a given day, or as the case may be, shall sail or sailed between certain days. Cowp 784. 601. Doug 346. Mars 233. 261. 574. Park 326. & John 1.

This must of course like every other warranty be strictly performed, and nothing will excuse an omission, even tho the ship shd be prevented from complying with the condition, by an embargo, imposed by Government, the insurer is discharged. For the insured in such cases, takes all the risk upon himself, that attends a compliance with the Warranty. *Ibid*.

So where the ship is prevented from sailing before the day by any resistless force, the insurer is discharged. — As^{tho} the, as if the port is blockaded by an enemy. *Ibid*. Cowp 784. Park 325. 6.

The warranty sometimes is, that the ship shall sail after a given day. This warranty must also be strictly be complied with. 8. John. 1. Mars 254. Park 336. 26.

But a warranty to sail on or before a given day, where there is also another warranty to sail with Convoy, is complied with by sailing before the day to join the Convoy. Tho the place of Rendezvous is out of the regular course of the voyage, nor is this a deviation as it is authorized

by usage. and if the ship shd be detained at the place of Rendezvous 'till after the day, it will not vacate the policy, for the act of sailing from the port of Lading before the day, is deemed a performance of the Warranty, Cow 601. Doug 346. Park 327. 8. Mars 255.7.

And under this warranty to sail on or before a given day, the Warranty is complied with, tho' she be driven back by stress of weather or irresistible force, for from the moment she sails on the voyage the risk attaches and of course the cause that drives her back, is one of the perils insured Vs. Doug 352 n. Mar 261.

In an insurance at and from an Island, the word, "at" includes the whole island, and in such a case if there is a warranty to sail, "at and from" & By a given day, sailing on the voyage from any part of the Island, before that day, is a performance of the warranty, Doug 346. Mars 259.

Another frequent warranty in time of war, is, that the ship shall sail with convoy, and if she sails without convoy, then the policy is "ipse facto" discharged. Whether it be through the fault of insured, or through the neglect and omission of government, to appoint a convoy, for by entering into the so warranty, the insured takes upon him the risk, of convoy's not being appointed by Government. In such cases, it is wholly immaterial, what was the cause of the loss, an Tempest. Lightning &c. The insurer is discharged at all events. Salk 443. Doug 72.

By Convoy, is meant a naval force appointed by Government for the protection of Commerce, Park 338, Mar 262. A convoy stipulated for, may be either for the whole voyage or part of it. But where there is a warranty to sail with convoy generally, with no limitations, the Convoy meant is understood to be for the whole voyage, Doug 72.

3 Lev 320. Park 345.6. Mars 263.5.9.

265.

But a warranty to sail with a convoy with a convoy for a voyage, is complied with, by sailing with one convoy the whole, or two or more convoys for different parts of the voyage.

Sailing with any force, than that appointed by Government to act as Convoy, is not a compliance with the warranty, Park 338.

339. 341. 2. Mars 271. Because they have no sailing orders. Mars 272

If a ship having arrived at the place of Rendezvous, after the convoy has departed, sails with any other force, it will not satisfy the Warranty, tho' she shd afterwards join the convoy, Park 314. 41. 338. 9. Mars 264. 72.

The ship is protected from the port of Lading to the port of Rendezvous, by the policy, tho' this passage shd not be named, Stra 1261. Mars. 265. Park 343.

But a warranty to sail with convoy for the voyage, does not necessarily mean she must be under convoy from the port of departure to the place of destination, if there is a usage to the contrary, such as the usage of the Eng Fleets to stop at the Downs and not sail up the rivers,

and such a convoy as government may appoint for a given ^{voyage} time is sufficient. 2 H B 551. Mar 267. 9.

There are also several other minute rules depending on usage, entirely. vide B et P III. Park 349.

They all amount to this, that where a literal performance is modified by usage, that general usage will govern.

If a ship sails under this warranty, but is separated from the convoy during the ~~convoyage~~ voyage by a peril insured vs, the warranty is not broken by that separation, but the insurer is still liable, for the reason why she does not continue with the convoy, is that she is prevented by one of those perils, the insurer has assumed, Doug 73. Park 443. Park 347. 3 Lev 320. Curth 216. #⁴ Rod 58.

Sailing instructions are regularly indispensable to a sailing with Convoy within the warranty. Sailing instructions are written directions from the commander of the Convoy, to the several shipmasters who are under the protection of the convoy, prescribing such *signals*, and other necessary arrangements to be observed by them, for the greater safety of their ships.

And the master is not presumed to have the whole benefit of the convoy witht such instructions. *Mars* 271. *Park* 392

If the ship arrives at the place of Rendezous, at the time appointed and the convoy is already gone, the warranty is not complied with, tho she shd afterwards join the convoy witht these sailing instructions. *Park* 393 *Mars* 272. 64

Still sailing instructions may be dispensed with under certain circumstances, as if the ship arrives at the place of Rendezous, and is prevented from obtaining instructions by stress of wether or any other peril insured vs, the insurer is not discharged, but in such cases, the master must get them as soon after sailing as possible, or he will not be excused in the event of a loss. *Str* 1250. 2. *Bel* P. 164. 1. *Doug* 5. *Mars* 274.3. *Park* 348.9.

So where the master being at the place of Rendezous in season, applies to the naval commander, for the necessary instructions and he refuses to give any, in this case, his sailing witht any, is a compliance with the warranty, as he has done all he ed do, as he ed not compel the commander to give them.

In these cases, however, he must use due diligence to obtain them, or the insurer will be discharged, 2 *Bel* P 164. *Mars* 375.6 The ship must not only depart with convoy (under these rules) but, must also continue with it, for the whole voyage, or so much of it, at least, as the convoy was to protect, unless seperated by necessity. *Mars* 278.9.

These rules, then, explain the meaning of the words, "Sail with Convoy," by wh it appears more than a liberal compliance is required.

If the ship omits to get under way with the convoy, and for this reason is out of its protection for any period of time however short, the Warranty is broken. This rule does not mean, that the ship must be a mile or league behind the convoy, as this must often happen, but it means only that she must not be out of its protection. Park 339. Mars 278.9.

And if the ship is separated by necessity from the convoy, she is bound to rejoin it as soon as possible, or the warranty is broken, if she was afterwards able to join it, and did not. 3 Lev 320, Carth 216. Park 445. & 4 Mod 58. Mars 279. 280.

This last Rule is laid ^{down} by Marsh with any references to support it, and it appears to me to be laid down too generally, for the insurer is liable for barratry, in the master, and if the fraud in the present case, amounts to barratry, as it may, then according to this latter rule the insurer wd still be liable.

But if the property is neutral at the time of warranty being made, the condition is complied with, and the policy is binding, even tho' the property may become belligerent subsequent during the voyage.

A subsequent declaration of war, is a super-venient event that does not avoid the policy. Long 705. Mars 286. 3 TR 447. 4 Burr 1419. 1 Bl R 417.

The usual evi of the falsity of these warranties, is the sentence of a Ct of Admiralty condemning them, as Lawful prizes. For such a sentence is generally conclusive, that the property was not neutral. TR 631. Mars 288, 99. 328. 614. Park 359 to 61.

There are however various subordinate rules, relating

to the sentence of a Ct of Admiralty, which qualify this
Gen Rule. *vide* Little Evidence,

Any subsequent forfeiture of the neutral character of the
property insured, by the act or neglect of the party insured,
is a breach of the warranty and discharges the insurers,

So also forfeiture of the Neutral character of the property
by willful act of the master or mariners, is a breach of
the warranty. But where the property is originally neutral,
a subsequent forfeiture avoids the policy only from that time,
so as to discharge the insurers from all subsequent risks, but
he is still liable for all losses, that may have happened
prior to the act creating the forfeiture; for the policy being
originally good, binds till then. 8. T.R. 23. 1. Bl. & 427. 1. Sum
1419. 1. Esp. 615.

The principle on which such subsequent act, avoids
the policy, is that such warranty implies, not only that
the property is neutral at the time, but also that its
neutral character shall not be ~~avoided~~ forfeited, by the
misconduct or default of the insured, or the master or mariners
during the voyage 7. T.R. 700. 8. Do 234 and a ship may
forfeit her neutrality by any act done, or attempted to be
done, contrary to the Law of Nations or in contravention of
treaties, and injurious to one of the belligerent powers, and
that power may capture the ship and condemn her as
a lawful prize *Ibid* et Mars 301.

Among the acts, by wh a ship originally neutral, may
forfeit her neutrality, is a refusal by such neutral ship ^{private}
to submit to visitation and search by a belligerent cruiser.
This is held to be a forfeiture of her neutral character and
therefore a breach of the warranty. For such refusal
according to the Law of Nations, subjects her to condemnation
as a prize. 8 T.R. 23. *Battel* B. 3. Ch. 7. Sec 114. *Mars*
66. 292. 301308. 301. 308. 316. 435.

To a refusal to produce the ship's documents, to prove her neutrality - or having none to shew - Mars 307

The Rule is the same, tho' the loss shd not be occasioned by the want of the documents, but by some other cause, If then the ship sails witht the documents required by the treaty, but shd obtain ^{them} before capture, and shd be condemned on any other ground, the insurers are discharged, for the Warranty being a condition precedent, must be literally complied with. Ibid Mars 317. to 319.

In these cases, the fact that the property was actually neutral, will not avail the insured in an action on the policy, and he cannot recover however clearly, he may show, that the ship was actually neutral. Ibid.

Indeed a warranty that the ship is neutral, impliedly stipulates, she is entitled to all the immunities of a neutral ship and it is upon this principle, that the want of necessary documents is a forfeiture. Mars 322.

But a noncompliance with the local regulations of either of the belligents, is no breach of the warranty, for such municipal regulations are in violation of the Laws of nations, and Neutrals are not bound to notice them, Of this description, were the Berlin and Milan Decrees, and a noncompliance with their arbitrary provisions, was held to be no forfeiture, of neutrality. 7. T. R. 631. 8. Do 343, 562. Mars 322 7. 53

It was formerly held, that neutrals were bound to know the local, municipal regulations of Foreign States, Parke 371. But this doctrine is now overruled.

If however a neutral is apprised of such municipal regulations of a foreign power, and does not intend to comply with them, he ought in fairness to disclose them to the insurers, as it may materially effect their risk Mars 323, 323 362.

Where both parties are ignorant of such regulations, the insurer of course takes the risk upon himself. So where both parties are apprized of them, the insurer then takes the risk, even tho' the insured shd not mention it. For it is only where the insured is apprized and the insurer is not, the insured is bound to disclose them. 8 Tl 343. Mass 323. 5. 6.

As in contracts of insurance, the most scrupulous honesty and fairness is required, it follows that the concealment or misrepresentation of any material fact regularly avoids the policy. Mass 334. Park 197.

A representation in insurance is a collateral statement, either in writing or by parol, of facts not inserted in the policy, but wh are necessary to enable the insurer to form a just estimation of the risk. Mass 335. Park 197.

A representation may be untrue either through fraud or mistake. wh under some circumstances produce very different results.

A wilful misrepresentation as to any fact wh is material to the risk, is a fraud wh always avoids the policy "ab initio". So that the insured cannot recover upon it, for a loss arising from a cause unconnected with that fact.

As if the ship is represented to be neutral property, when in fact it is enemys property. The insured cannot recover for a loss occasioned by shipwreck. 3 Burr 419. 2 Blk 427. Park 197. 199. 202. 4. 177. Mass 335.

The Rule is the same if the representation is made by the Agent or Broker. 1 Tl 12. Mass 208. 335. 7. 40.

And if the party or his agent misrepresent a material fact, witht knowing whether it be true or false, the policy is void, for it is clearly a fraud and equally injurious to the insurers. 5. Burr. 1919. or 1909. Doug 247. Mass 335. 6. 674. 1.

So again if the insured or his agent positively represents

a material fact as existing, but wh does not in fact exist, the Rule is the same, even tho' he believes it to be true. It is not void on the ground of fraud, but because his representation is regarded as an inducement, in subscribing the policy. Doug 247. 1. Ill 12. Mars 336. 670. L. N. Mars 208.

4 Burr 1909. Doug 247.

Park 205. 6. 175.

But if the insured makes a statement as a matter of opinion merely, without knowing the fact, and not having any reason to think it untrue; this opinion tho' false, will not avoid the policy. For as what he states, it professedly, but mere matter of opinion, the insurer may inform himself of the grounds of that opinion, and if he neglects to do so, he takes upon himself the risk of its being unfounded. Park 207.

But if the insured had expressed as mere matter of opinion, what he knew to be false, it wd doubtless be a fraud wh wd avoid the policy. Mars 336. 670. Park 207.

So the expression of a mere expectation does not amount to a representation within these rules, and the insurer, if he has any doubt, must at his peril, inform himself of the grounds of this expectation. Doug 292. Park 265. 6. Mar 336. Park 208.

But in this as in the former case, if the insured expressed an expectation of what he did not believe, and that expectation was favourable to the risk, the policy wd be void on the ground of fraud.

There is a material difference in the effect of misrepresentation and a warranty. First. A warranty is always a part of the written policy, but a representation never is, for if it were, its character wd be altered.

Second. a warranty being in the nature of a condition precedent, must be literally complied with; But it is sufficient if the representation is true in substance: and in some cases, tho' false, if honest, it will not avoid the policy.

272.
Third. A warranty must be complied with at all events, whether material to the event or not. But a representation, if made without fraud, and not false in a material point, tho' it may be so in an immaterial one, does not affect the policy.

Fourth. A false warranty avoids the policy, as being a breach of that condition, on which the contract is to take effect. A false representation never can be a breach of the contract, but if material, it avoids the policy, on the ground of fraud, or at least on the ground, that the insurer has been misled by it, whether fraudulent or not.

If the Agent of the insured makes any unauthorized representation, by which the policy is defeated, he is liable over to his Principal in the event of a loss. Cow 787. Doug 793. 3 Burr 1419. 1. B. & O 427. Park 210. to 14.

A false representation made as to a material fact to the first insurer, is considered as made to all whose names are upon the policy. For the fact that A has underwritten may be sufficient inducement to B to underwrite.

And were the rule otherwise a subscription of one might be obtained as a decoy to others. Park 198. 200. 7. 8. Cowp 784. Doug 292. Mor. 338. 670. 1. 1. B. & O 427.

It is sufficient that the representation be true in substance as if insured represents the ship as having a given force on board as six 24. pounders, when she has but 5. The insured's statement was sufficiently correct, and 2. 12 pounders. Cowp 785. Park 200. 1. Mars 341.

So where the insured represents the voyage as less, than it really is. - if it is truly described in the policy, it is sufficient, and the representation can't vitiate the policy. For it is the insurer's business to know the geographical distances. Doug 274. Mars 342. 3. Doug 277.

But in this case, if the representation was made to deceive the insurer, it wd be a fraud, wd avoid the policy. The result of the Rules, then is, That a false representation will ~~as~~ not avoid the policy, if there is no fraud in the case and if the insurer is not deceived by it.

But on the other hand, if there is any fraud, or if without fraud, the insurer has been misled by it in a material point, the policy is void and the insurer is discharged. Doug 238. Mars 243. 246.

Concealment.

It is a maxim in the law of insurance, that "suppressio veri" is equivalent to "suggestio falsi" therefore a wilful concealment of any fact by the insured material to the risk, will avoid the policy. This rule, however, supposes, that the insurer is ignorant of the fact, for if he knew the fact, the insured is not bound to communicate it.

This concealment may regard the time of sailing, the situation of the ship, the nature of her employment, and ^{any} other fact wd may diminish or increase the risk. 1. N B 14. 2. H.C. 460
2 Bb R 465. 594. 3 Burr 1909. 1. Bb R 465.

In such cases where there is a material concealment, the insurer is not liable for a loss arising from a cause unconnected with the fact concealed. For it has the same effect as the falsity of a warranty. Ibid et Str 1183. Mars 348. 52.

And such concealment by the agent, who procured the insurance, is held to avoid the policy, even tho there was no proof, that the principal was apprised of the fact concealed by the agent for if a wilful misrepresentation by the agent will avoid the policy, a wilful concealment ought to have the same effect.
Mars 349. 350. 208. Park 209. 10. 14.

If the insured knows, when the ship will be ready to sail from a foreign port, and does not inform the insurer, this concealment will avoid the policy, for the time of sailing oftentimes may vary the risk materially. *Mars 349. 350. 298. Park 209. 10. 1. Esp. R. 272. 407. Peak R. 43. Mars 350. Park 182.*

If the ship is engaged in dangerous service, and the fact is concealed, the policy is void, and insurer is discharged, *Mars. 357. Doug. 306.*

And a material concealment is fatal to the policy, tho' the insured or his agent concealing the fact, believe it to be altogether immaterial. *Doug 306. Mars 35.*

and where an absent ship is insured with the words, "lost or not lost," common rumours as to the ship's safety, if there be any, must be disclosed to every insurer, otherwise the policy will not be binding upon those not knowing them. *2. B. N. 170. Mars. 357.*

If the owners having received intelligence that renders the loss of the ship, probable, and do not disclose the fact to the insurers, the policy is void, even tho' the intelligence should afterwards prove to be groundless. For the policy was void "ab initio" having been obtained by fraud. *Titang 1183. Mars 348. 352.*

A concealment by the insurer may also avoid the policy, so as to oblige him to restore the premium, as if the insurer at the time of insuring, knew that the ship had arrived in safety at her port of destination, the insured may recover back the premium. The only effect of a concealment on the part of the insurer is, to avoid the premium. *1. B. & C. 549. 3 Burr 19. 09. 1. B. & C. 594. Mars 352.*

The insured is not bound to disclose what the insurer ought to know, i.e. what every man is presumed to know, as that there are periodical hurricanes in the *W. Indies*, or the the proposed voyage's distance &c. *1. B. & C. 593. 463. 3 Burr 1909. Mars 353. 4. Park 181. 3.*

Nor is the insured bound to communicate matters of general intelligence, as that a war subsists between certain belligerent powers, as these are facts of public notoriety. Nor is he obliged to disclose his own political speculations regarding the probability of a war. For the insurer is supposed to have the same means of judging. *Ibid* at Park 183. 1. *Pl. R.* 594, 3 *P.*

Mars 353. Park 183.

Still less is he bound to disclose facts wh tend to diminish the risk. Mars 353.4. Park 183.

Nor is it ever necessary for the insured to disclose the situation of the ship, tho' she be wholly unseaworthy, because in every contract of insurance, there is an implied warranty on the part of the insured, that the ship is seaworthy. Mars 355. 64. Park 299.

Indeed it is a rule that the insured is not bound to disclose any thing, for wh he has stipulated by a warranty either express, or implied, for the warranty furnishes the insurer every possible benefit wh he might derive from further disclosure. Mars 355.72. 364. Park 299.

and it seems, it is not necessary for the insured to disclose any fact wh the insurer ought as a matter of course to presume. Thus if the captors of a ship procure an insurance upon the prize immediately after the engagement, in this case the insured need not disclose the state of captured ship. For it must be presumed, she is much damaged and if the insurer is desirous of ascertaining the extent, he may enquire. Emerigon 172. 356. *Marine Law*.

Where the commander of a fortress procured it to be insured vs capture, in this case, it is said, that the speculations of the insured, as to the probability of an attack, or if he knew of a meditated attack, he need not discover it, to the insurer. For reasons of policy operating vs such disclosures. 3. *Burr* 1925. 1. *Pl. R.* 593. Park 183. 93. But for this very reason, that the policy of war forbids such disclosures, it is that Marshall doubts the propriety of such insurances. Mar 357. 62.

In every insurance upon a ship, the nature of the contract, implies a warranty, that she is seaworthy, and this rule holds tho' the insurance be on the goods on board of the ship, The Principle of the rule is, that the insured ought not in justice to recover for any loss occasioned by any internal defect, in the subject insured and tho' the cargo be insured an internal defect in the ship, will discharge the insurer, for

in all such cases, the cause of loss is imputed to the insured. *Mars* 362, 73. *Park* 220, 230.

Hence if the ship proves to be incapable of performing the voyage insured, from any latent defect, not occasioned by any peril insured vs. but wh existed before the voyage, commenced, the insurer is discharged. *Ibid.*

And this warranty extends to not only to the hull and tackle of a ship, but to all so necessary appointments, and provisions for the voyage, It implies, then, not only that the ship shall be tight and staunch, but also properly manned, provided with all necessary stores, and in all respects fit to perform the voyage with the cargo. *Mars* 364.

Further the warranty implies, that the ship shall be able to encounter all the ordinary perils of the voyage insured.

For the insurer assumes the risk of extraordinary perils only.

Ibid and when the ship is found unable during the voyage to proceed to the place of her destination, she will be presumed to have been defective at the time of sailing, unless her incapacity appears to have been occasioned by stress of weather or other unforeseen accident during the voyage. *Ibid*

The warranty also imports, that she shall be fit for the particular trade, in wh she is employed during the voyage. Otherwise she is not seaworthy, within the meaning of the Rule. *Mars* 367.

And if she was ^{not} seaworthy at the time of sailing, the owners' ignorance of that fact, or his care to render her seaworthy, will not avail him, the policy must be void, for if the condition is not complied with, there is no contract. 5 Burr 2804, Mars 368. 72. Park 203. 30. Mars 268 to 72. 277.

The Rule is the same, tho' both the Capt and insured believe her seaworthy, and tho' the insurer knew her condition, as well as the insured. For her defect may be latent. Ibid.

Where goods are freighted and sustain damage by the ship's unseaworthiness, the master and owners are liable to the freighters for the loss, and the insurer is not liable at all. 1. Vent 190. 238. Raym 220, 3 Feb 72. 17. 12. 38. Mars 156. 9. 372. 3. 112. 35.

But on the other hand, if the ship was seaworthy at the time of sailing, and is afterwards rendered defective by stress of weather, or any other of the perils insured vs. the insurer, and not the master and owner, is liable to the freighters. Mars 372. 3.

If the ship sailed in a place of difficult navigation, without a pilot and a loss ensued, the insurer is discharged, for this is a defect or want of equipment in the nature of unseaworthiness, at the time, when the Pilot was needed. 7. T. R. 160. This rule has been much litigated, and was decided in the case of Grant vs Williams, 1. Conn R

Mars 373. 4.

Where a necessity occurs, a ship may be changed for another, without discharging the insurer, as where the Ship having performed part of her voyage, suffers a disaster which prevents her from proceeding, the Master may procure another ship and proceed to the port of destination and the risk will continue 1. Burr 351. St 1284. 1. T. R. 611. Mars 162. 3. 374. 6. 656.

And if the proceeds of goods saved from a wreck, sold or exchanged, are put on board of another ship, to be sent to the place of destination, the proceeds will be protected by the insurance. 1. L.R. 611. N. Mass 378.7

and when the ship is disabled during the voyage, it is the duty of the master, if he can and appears to him best for all concerned, to hire another ship and proceed to the place of destination and in this case, the risk on the goods continues, tho' the risk on the ship does not,

In all these cases, the insurers are liable for every necessary expence occasioned by the change of the ship, for this expence constitutes a partial average loss. Doug 219. 1. L.R. 611. Mass 378. 498. 527. 379. Park 19. 290.1.

If two policies are effected on the same goods, and for the same voyage, and are expressed to be sent in a ship or ships and the goods are divided, one half being sent in the ship A. and the residue in the ship B. and those on board of the ship A are lost, the insurers to both policies are bound to contribute to the loss, for both policies are regarded in law, as making but one entire instrument, This point has not been precisely decided yet, it seems to follow as a matter of course. Park 280.1. 1. Burr 492. 1. B.R. 416. Mass 115. 380. 5. 685. 6. 2 H.R. 245. N.

Conduct of the Ship

There is always an implied agreement on the part of the insured, that the ship shall be navigated according to law 12. public law, the merchant Law of the state to wh she belongs, and also in accordance with treaties between that state and other powers. 8 L.R. 192. 7. 20. 186. 3 20 454. Mar 122. 385. 9.

If the voyage, tho' legal in its destination, is pursued in an illegal manner, the insurer is discharged. 7 L.R. 186. Mass 48. to 73. 122. 385.

279.

If a neutral, then engages in a voyage lawful in itself, but violates the laws of war, between two belligerents, that violation is a breach of the implied condition. *Id.*
'*vide Ante Page*.

Under this head, occurs the subject of deviations, wh was defined to be a voluntary departure from the usual course of the voyage, insured, or rather a departure without necessity.
1. Bet P. 313. Mars 392. 594. 408. 655.

For there is an implied condition in every policy, except so far as the policy promises the contrary, the ship shall proceed to the place of destination by the shortest and safest usual course, and if she voluntarily deviates from that course, the Policy is discharged. Doug 278. Mars 392.

But tho' a deviation is called a voluntary departure, yet a departure through ignorance, tho' no departure was intended, amounts to a deviation within the rule.

Thence a voluntary deviation from the safest and usual course, being a breach of the implied condition, determines the contract and discharges the insurer from all subsequent loss. Doug 18. Palk 444. 6. TR 331. Park 294

By the course of the voyage is necessarily meant the ^{not} shortest track, but the usual and regular course pursued, if there is any. Therefore touching at places out of the direct track to the port insured, is no deviation, if it be in accordance with the usual and settled practice. For in this case General usage authorises the departure. 1. Burr 348. 3. Do 1707. Mars 182. 392 3.

A usage however to touch at ports out of the direct track, ^{only} can be established by a long and general custom, an occasional practice will not authorise the departure.

If a ship deviates from the usual track, after a partial loss, and subsequently sustains a / another loss, even a total loss, the insurer is discharged from this second loss, tho' liable for the first, and in such cases, he may retain the whole premium for the risk once attached upon the whole, 2 Galk 444. 2d. Raymond 840. 3 Burr 1240. 2 Do 1008. Cowp 668. 3 TR 266

The time or distance of deviation is not material, however short it may be, in this particular, it is fatal, nor is it material, whether the risk is enhanced or not by the deviation.

If therefore in opposition to common usage, the ship deviates a mile or league and returns again in about an hour, from the moment of her departure, the insurer is discharged. Beaves 315. Mars 186. 394. 401.

If several ports of discharge are named in the policy, they are to be visited by the ship, in the order, in which they are named, and if she visits them in a different order, it is a deviation which will discharge the insurers. The reason is, this is supposed to have been the intention of the ^{parties} insurers at the time of making the contract. 6 TR 651.

But if the voyage embraces several ports, not specifically named in the policy, those ports must be visited in their Geographical order, as they occur. As an insurance from London to Cadiz, and her ports of discharge in the Mediterranean in their geographical order, without more. In this case, she must go to the first port in the Mediterranean, in their geographical order, but if she goes first to the most distant port, the insurer is then discharged from all subsequent risk. 6 TR 313. Mars 396.

This rule supposes the master voluntarily changed the order. But if the ship is compelled from necessity, to alter the course of their order, or the order of the places, it will be no deviation. Bet 250. 313. Mars 392. 7. 408. 494

If a letter of Marque insured, sails in quest of prizes, it is a deviation, But if she goes 'close to an enemy in the usual course of the voyage, it is no deviation Beawes 316. Mars 402.

Any unnecessary delay either in the commencement or prosecution of the voyage, is in the nature of a deviation, and has the same effect, for it augments the risk, and there is always an implied condition, that the ship shall perform the voyage within a reasonable time. Mars 405. Park 313.

1. In some cases, a departure from the direct course, of the voyage is justifiable and of course will not discharge the insurer, but these are all cases of necessity, as where a departure is occasioned by a stress of weather, it is no breach of the implied condition. 1. Burr 347. Mars 408. Park 313.

A deviation is a departure, But a departure is not a deviation, always. In all such cases, the ship is not bound to return to the Point from wh she was driven, but must there make the best of her way to the port of destination. *Ibid.*

It is a general rule, that if the captain in departing from the usual course, acts fairly and according to the best of his judgment for all concerned, and has no other view, but to conduct the ship by the shortest and safest, practicable course, to the port of destination, such departure is justifiable. *Ibid.*

- 2^d Want of necessary repairs during the voyage, is another excuse, wh will justify a departure from the direct course to procure these repairs, to be made. In this case the ship shd go to the nearest port. 1. Alk 545. Park 310. 11. Mars 410.

- 3^d She may also depart for the purpose of joining the convoy, where the convoy is out of the direct track. Salk 445. Str 1265. Cow 601. 601.

- 4th So to escape or avoid an enemy. Mars 412.
- 5th So if the crew mutiny and compel the captain to

to deviate, and put into port out of the course of the voyage. The Capt is excused. 2 Strange 1264 Mars 412. 447. In all these cases, the extent of the departure must be limited by the degree of necessity. Ibid.

The new course wh he may thus be obliged to adopt must be pursued with the same fidelity and any wilful departure, from this new track will amount to a deviation within the Rule. Doug 271. Mars 413.

For a list of Perils insured vs. vide Form Mars 711.14. and the particular perils to wh the insurance extends, are all specially enumerated.

Every loss, is either Partial or Total. A total loss may either consist in an absolute destruction of the property insured, or of such damage done, as renders it of little or no value. and the loss is total, if by any misfortune the voyage is lost or not worth pursuing.

And if in consequence of disaster a further expence becomes necessary and the Insurer upon application refuses to undertake the payment of the loss, the loss is then deemed total.

The voyage is considered as not worth pursuing, when the value of what is saved, is worth less than the amount of the Freight i.e. the price of transportation to the place of destination. 3 Atk 195. Mars 414. 497 506. Park 98, 143. Mars 493. 15.

This is not the only case in wh the voyage is lost. If by any of the perils insured vs. the voyage is lost, the loss is total.

Every Loss short of a total loss, is partial. If therefore a ship insured for a given voyage, reaches her port of destination and there remains 24 hours moored in safety, and damage however great she may have sustained during the voyage, will not amount to a total loss. 1. Ld 187. Mars 415. 503. 479.

If therefore the ship shd founder in port, one hour after this period has elapsed, in consequence of damage during the voyage, the insurer is not liable for the total loss and the partial loss for wh he is liable, must be estimated by the amount of injury sustained before the expiration of the 24 hours.

The Rule is the same, where a ship is insured for a given time, and she survived the time, tho' foundered the next day, in consequence of a damage previously sustained, the Insurer is liable only for a partial loss.

If goods specifically remain and are actually landed at the port of delivery, the damage however great amounts only to a partial loss, and the insured can recover only for a partial loss. 2 Burr 142. 1172. Mass 415. Park 98.9.

Partial losses are sometimes called average losses. Mass 142. 415. 466. Park 78. 99. 98.

Losses considered with reference to their immediate causes are various kinds and it is actually indispensable that they be accurately distinguished, because if the action on the policy ascribes the loss to one cause, and it is ascertained to be by another, the insured can't recover in that action.

First loss by the perils of the sea in the limited sense of that word includes any such perils as proceed from mere sea damage, as tempest, rains, Lightnings, rocks, Shoals &c. But these include only a small part of the perils covered by the policy. Park 61. Mass 416. 131

In a more comprehensive sense, these words include all perils to wh a sea voyage is exposed. However perils of the sea are used in their more limited sense. Mass 416

It often happens in a case of total loss, that the insured

are unable to prove the cause of the loss, as where a ship founders at sea, and all hands perish. In such cases if the ship be not heard of in a reasonable time, she shall be presumed to have foundered at sea, because any other loss wd sooner or later be heard of.

In such cases, then the insured may recover as for a loss from sinking, but if he shd declare as for a loss, by ~~and~~ capture, detention of Princes, &c or for whatever cause or a loss by whatever cause, he can't recover. *Str* 1199. *Mars* 419. 316. *Park* 634. *Mars* 416. 516. But no time is limited by the Eng or our own law for foundering, this presumption rests necessarily upon circumstances *Str* 1199. *Mars* 418.

Every loss is ascribed to its immediate or proximate cause, and not to its remote cause, and so it must be ascribed in the declaration on the policy. If the ship be driven by stress of weather on the enemys coast and is there captured, this is a loss by capture and not by peril of the sea. The capture being the immediate ^{cause} ~~cause~~ of the tempest, the remote cause of the loss. 6 *TR* 656. 1. *Exp* 444. *Mars* 418. 133. 4. 617.

Sometimes a ship is destroyed by worms, worms in her hull and it has been decided, that this is not a peril of the sea being frequently owing to Masters neglect. *Exp* 444. *Mars* 419. The loss must be ascribed to them.

The insurer is not liable for any diminution in the value of the ship, occasioned by the ordinary usage in wh she is engaged. For this wear and tare is incident to every voyage. *Cowp* 56. *Mars* 420. 416. 131. *Palk* 161.

Cromb 56. *Cumberbach* 56 not *Crombor*. If animals on board are insured and die by natural disease, the insurer is not liable. But if they are thrown or washed overboard in a storm, or killed by a shot

from an enemy or any other extraordinary accident, the Insurer is liable. Mars 420.

Second. A loss occasioned by one ship running down another, is a loss within the common policy, unless caused by the Master's fault or mariners, and in the latter case Marshal conceives, that the insurer wd be liable for the loss, as amounting to Barratry in the Master. Mars 420. 21. I Gould. thinks not so.

At any rate an action will lie vs master for a loss, occasioned by his own misconduct. 1 Vent 190 238. Raymō 220, Mars 157 9. 421. 42.

Third. A loss by fire witht any fault on the part of the Master or sailors, is a loss within the policy, and if the property is burned through the fault of the Master, he is liable, but the insurer is not unless it amounts to Barratry. Mars 421. 42.

Fourth. Every loss by capture & whether lawful or unlawful, by Friend or Foe, is a loss within the policy, for wh insurer is liable.

And if property insured is captured and unrecovered by the owners, the loss is necessarily total, but if the property is recovered by a Capture, or other means before abandonment by the insured, the loss is only partial, tho' the amount of damage sustained by the detention and expence incurred in regaining the property, constituting the partial loss, is recovered.

Mars 423.

In these cases, where the property is recovered before abandonment, the insurer is bound to pay the salvage and all other necessary expences in recovering the property. Mars 422. 423. 469.

By the word "Salvage" is here meant the expence incurred in recovering the property. This word is also used in this Title, to denote amount of property insured from disaster, or saved from destruction.

secured

Insurer is liable for a loss by capture, an the property in the subject insured, be changed by the capture or not, i.e. vested in the Captors or not, and an the property has been carried into a hostile port or not. That is to say, the Insured in either case, has a right to treat the capture as a total loss, and recover on the policy as for a total loss. For in either case while the property is detained, the loss to the insured is the same, i.e. the whole property in the thing is taken from him. *Mars 423.*

If therefore the property is captured by a Pirate, the loss is total, the insured may recover it as such, tho' by the Law of Nations, such capture wd. vest the property in the captors. *Ibid*

As between the Insurer and the Captors or recaptors, or purchasers, under either of them, the question is, an the property of the thing has been changed or not, are all important, but between the Insured and insurer, those questions are of no consequence, even it is no objection to an action on the policy, that the property is not yet legally vested in the Captors. For in point of fact, the property is lost to the Insured and an rightfully or not, cannot be a question between the parties. *Mars 423. 2 Burr 675.*

Capture of property insured is always prima facie a total loss, i.e. it is always so regarded for the purpose of enabling the insured to abandon all right in the property to the insurer, and then recover as for a total loss; and if the property is recovered after such an abandonment by the Insured, it will enure to the benefit of the insurer. *Mars 423. 9. 490. 3. 2 Burr 675. Mars 483.*

It has been a question of much perplexity, at what time and under what circumstances, the property in the thing captured by the Law of Nations changed and vested

in the Captors, It has been held by some, that the property of the insured is divested and transferred to the Captors, when the things captured are within the protection of a hostile port, or fortress, as when put into the enemy's harbour, or where they have been in the possession of the Captors 24 hours. As it is said, that all hopes of a recapture will be at an end. But the Rule now established in England and U. S. is, that the original owner is not divested of his property in the thing captured, till they have been condemned as a prize by a foreign prize Court, But that such condemnation vests the property in the captors. 2 Burr 695. 10. Mod 79. Mass 428. 72. 92. 3. Mere capture does not change the property. Mass 486.

And if the Captors witht proving any sentence of condemnation sell the property to a third person, and that property afterwards comes within the reach of the original owner, he may seize it as his own. For until sentence of condemnation, the title to the property does not pass from him to the Captors.

Where a ship or other property is captured the insured may immediately abandon the property to the insurer, and having done this may claim payment as for a total loss.

Abandonment is a relinquishment by the Insured of all interest in the subject insured, of course a subsequent recovery of the property insured will inure to the Insurer. The insured however can never be compelled to abandon, it being at his own election, whether he will or not. 2 Burr 699. 3 TR 479. Mass 414. 427. 79. 506. 2 Burr 696.

No capture by the enemy is of itself and witht condemnation a total loss, in such a manner as to preclude all possibility of recovery by the Insured, except where the captured

ship is converted by act of government into a ship of War, 2 Burr 1198. 1. Atk 276. Mars 429 72, 493.

If therefore the owner ~~even~~ retakes the property captured he will absolutely be entitled to it, and if it shd be recaptured before condemnation by another ship of the same nation, he will be entitled to the restitution of it, or paying salvage, or paying the Captors, a reasonable sum for the expence and trouble of retaking the property. Mars 429.

This right to restitution, is called in Law "Jus post liminii" wh by the general marine Law, always continues until the property captured has been condemned as prize by a foreign admiralty Ct. But after such condemnation, wh passes all title to the Captors, he is not entitled to restitution, his property in thing being gone. But By Stat Geo II. a "jus post limine" continues in case of recapture by the same nation, even after such condemnation. Mars 429.

When property ^{of the} insured is recaptured, the insurer stands in his place, For ^{by} such abandonment all the right and interest of the insured ^{goes} to the insurer. Mars 429.

And where after capture, property is restored to the insured, the insurer is bound to defray all necessary expences incurred in recovering the property, and this he is bound to do, whether the capture is legal or not.

Thus if a captain of a ship captured "bona Fide" pays a sum of money to the captors and the property is redelivered to him, the insurers are bound to reimburse him. 1. Atk 1 Bl R 313. Mars 429. to 31.

The Rule is the same when upon a capture, the master warrants the ship and takes a bill of ransom, wh protects the ship from further capture. In this case

the ransom money is a partial loss occasioned by one of the perils insured vs, for wh the insurers are liable.
 Doug 678. 3. Burr 1736. 1 Bl R 563.

The ransom bill is signed by the captors of the ship, and a hostage is usually given to the captors, as a pledge for the payment of the ransom money. and this contract of ransom is binding by the Laws of nations, upon the owners, as well as upon the master and hostage. Vide Title Contracts.

5th. Another peril insured vs is the detention of Princes, and people. This species of risk differs materially from that of capture. The object of the one is prize, while that of the other is to carry into effect some object of State policy.

By the established form of the policy, the insure is liable for all loss occasioned by arrests and detention under the authority of any Prince or people exercising Sovereign power, in amity with the nation to wh the ship belongs, under any pretence whatever, under any pretence whatever. As where the ship is arrested by the Sovereign power of the country, to wh she belongs. or any other power in amity from with her, from motives of necessity, and not of hostility. Such arrest will be deemed detention of Princes. Mars 434.5.

Hostile detention in port after a declaration of war, by or vs the Sovereign detaining, is strictly a capture and not a detention. For this is a hostile detention with the view of making a prize, and warrants an immediate abandonment, as for a loss by capture, and claim for a total loss. Ibid auct.

An arrest of Princes may take place at sea, as well as in port or harbour, if done from public necessity and not from a view of prize or plunder.

Thus where a neutral ship was seized at sea, with a cargo

of provisions, for the relief of a fortress suffering under famine and with a view of paying for the provisions, they are forcibly taken, was held to be a detention of Princes and not a capture. *Ibid.*

But if a Neutral is taken at sea under the pretence, that she is enemy's property, or that she is enemy's property, or that she is laden with enemy's goods, their arrest is properly a capture, for it is done as an act of hostility, and tho' the property shd afterwards be ultimately restored, this will not change the original nature of the seizure, Mars 303. 435. Park 363.

This clause extends to people as well as Princes, but by the word people is not meant a mob or rabble, but a people or nation, or rather the Ruling Power of the country De Facto, without any regard to the Rulers De Jure. 4 TB 783. Park 78. Mars 147. 436. 593. 617.

If therefore a ship is seized by a lawless rabble, the loss does not come within this clause, but is deemed a loss by Pirates or robbers, and not a detention of people. *Ibid.* If the ship be arrested by the authority of the State, to which she belongs, this is a loss within the policy, and the Insurers are liable for this detention, and the rule is the same, where it is the act of a state in amity with that nation. TB 640. Falk 444. (437. 8. this last by Mars.

A seizure made after a cessation of hostilities, and after preliminary articles of peace by one of the parties, to those articles, is an arrest of Princes, and not a Capture. For the Powers are ^{not} then in actual war. *Deauve* 316 Mars 461. 416.

The most frequent cause of such detention, is that of an Embargo, and this is legal or illegal amounts to a detention within the policy, and the Insurer is liable

proviso it is not an act of hostility, if it were it
would amount to a capture. Cowp 784. 1 Burr 696. 1 B&C
270. 4 Mod 1779.

Sixth. Another loss provided for in the common policy
is Barratry, which is defined to be any species of fraud or
deceit committed by the Master or Mariners to the injury
of the owners. Thus if the Master or mariners run away with
the ship or willfully deviate from the proper course for the
purpose of injuring the owners, or wantonly, or unnecessarily
risk or desert her, or embroil the cargo, or engage in smuggling,
or any other offence calculated to defraud the owners, or whereby
the ship or cargo may be subjected to arrest, detention, loss,
or forfeiture, it amounts to Barratry, and the slightest
act of knavery with these intentions is Barratry. Mars
442. 301. 456. 599.

Barratry then includes every fraud, that may be com-
mitted by the master or mariners vs the Owners, and therefore
where it was alleged in the declaration, that the loss was
caused by the ^{fraud} cause by negligence of the master, it was
determined, that it was a sufficient averment of Barratry.

Strange 851. 581. Id Bay 1349. 1 Ld 323. Mars 443. 5. 595.
It has always appeared unaccountable to me, said Judge
Gould, that underwriters should ever insure vs barratry.

It is virtually ensuring the owners vs the fraud of his own
Agent, whom he may appoint and dismiss at pleasure, while
the Insurer can do neither, yet it has become as common
a risk as any other in the policy.

By the Law of some countries, the owner cannot be insured
vs the Barratry of the Master, on the ground, that it is
ensuring him vs his own fraud. Still in Eng and here, such
insurance is allowed. Strang 1264. 1173. 581. 1 Ld 323.
Cowp 143. 3 Ld 277. 4. do 37. 1 Ld 252. 8 do 127.

The insurer is never liable for Barratry in the Master or Mariners, except by express stipulation in the policy. For there is no such thing as implied liability arising from the nature of the Contract. 1. 5 B. 22, 252. 3 Do 277. 4 Do 37. 8. Do 126.

The Captain may be insured vs barratry of the crew, as they may mutiny and commit barratry vs his will. But he may not be insured vs his own barratry. Mars 445.

It follows from this description of Barratry, that a deviation not with a fraudulent motive, does not amount to Barratry. Tho' such deviation may avoid the policy,

As if the Master shd deviate from ignorance or want of skill, this deviation will avoid the policy, but not amount to Barratry in the Master. 7 B. 505. 1. Do 323. Mars 445. 6.

It was held that where a captain of a Seller of Marque cruised in quest of prizes contrary to his orders, that this act was Barratry tho' manifestly done for the benefit of the owners. 6 B. 379. Mars 195. 448. 8. 9. In deciding this case, the Ct must have adopted the principle, that any act by the Master in violation of his orders, must necessarily involve fraud vs the owners.

As Barratry is an offence vs the owners, it follows that it can't be committed by ^{thm} ~~them~~ and with their consent. They may make themselves liable, however, to the Freighters, as common carriers, tho' not as Barraters. Strong 1173. 1. B. 322. 3. Mars 449. 52.

Hence where the shipowner is master, barratry can't be committed by him. *Ibid.*

But a general Freighter as he is called, is regarded as the shipowner for the voyage, hence a deviation without his knowledge, tho' with the consent of the original owners or lessors, is Barratry.

By a general Freighter is here meant a lessee of a ship for a voyage or for a given time.

But if there is only a covenant by the owners, to convey goods for another, the rule does not hold, for he is then regarded as owner for the time being. *Mars 455.6. Cowp. 142.*

If the ship insured is only a lawful

ship the Insurance shall be express in any lawful trade, the Insurer will be liable, if the captain engages in any unlawful trade on his own account, for it then amounts to Barratry, it necessarily being a fraud as the owners. *3 TR 279. Mars 458.9.*

Seventh. Another species of loss included in the common policy, is a loss by average contributions. I have before observed that the word average in one sense, denotes a contribution made by owners of the ship & cargo, towards a particular loss, ^{voluntarily} sustained by an individual and in another sense it denotes the partial loss itself. The former of the definitions will now be considered.

This contribution is of course a partial loss to all who are subjected to it, and for this loss the insurer is liable. *3 Burr 1555. 3 TR 323. 1 TR 323. Mars 460. 142.*

In the terms of most policies, the insurers bind themselves to indemnify as this species of loss, under the name of General Average.

Under this head, it is a general rule that where any loss is sustained, or any expence fairly incurred by one individual to prevent a total loss of ship and cargo. This loss is to be ratably born by the owners of the ship, Freight and Cargo on board. and they are to contribute in proportion to the amount of their respective interests. *Beaves 148. Mar 461. Maloy B 2 C 2 See 12.*

There are various other averages known to the law of insurance. Thus petty or accustomed averages, are certain necessary expences, incident to every voyage. as Pilotage, Stowage, light money: which are incidental to all voyages,

and are not regarded as losses within the policy, unless incurred for any extraordinary purpose during the voyage, as to provide for an impending danger or in consequence of any disaster, they are then deemed general averages for wh the Insurer will be liable. Mars 462.

The owners are liable of course, in the case of a general average and so far as they are liable, they incur a loss, wh the Insurer is bound to pay. If the masts, cable, anchors and other furniture is cut or cast overboard, for the preservation of the ship or cargo, the rule is the same and it occasions a general contribution in favour of the ship owners. Now those who contribute, sustain a loss to the amount of their contribution, for wh particular loss the Insurer is liable. 1. East 220. 1. Maloy, Ch 2. D.C. Mar 461. 5. B. 2.

So if a contribution is paid to a Pirate, to save the ship and Cargo, this will occasion a general average. for wh the Insurer is liable.

So where damages are sustained in defending the ship from capture. So if any of the crew are wounded in defending the ship, the expence incurred in curing them, is a subject of general contribution, for wh the Insurer is liable.

So expences incurred in reclaiming the ship ^{and cargo} from condemnation in a foreign Ct of admiralty, is a subject of general contribution. Beaves 148. Mars 462. Maloy B 2. Ch 2. Sec 6. Showers Showers parliamentary cases.

These expences, however, to occasion a general contribution must be fairly and actually incurred, as one party may not uselessly squander money for this purpose. and then claim a general average to reimburse his expenditures.

Still this contribution can never be claimed in case of a disaster at sea, only where, the sacrifice made to secure the rest, appears upon such deliberation as could be had among the officers, to be absolutely required to save the rest,

Hence if the captain or any persons on board, shd wantonly or through fright and without necessity, throw overboard the goods of a particular freighter, there can be no general contribution. Tho the Capt and such other persons wd doubtlessly be liable for their misconduct. Beaves 148. Mar 462.

Another material rule is that the contribution can be enforced only where the sacrifice appears actually to have conduced to the preservation and Cargo. If a Pyrate having captured a ship selects and takes away the goods of one particular freighter, only, there can be no contribution enforced on the goods of others, for the loss of those goods did not conduce to the preservation of the others. Mars 462.3

So if the goods of a particular freighter sustain damage in a storm. *Ibid*. If particular goods are landed to avoid capture, and those left on board are taken by the enemy, no contribution can be enforced upon the owners of the goods, wh were landed. *Ibid*.

So if the ship and cargo are not in fact saved by the sacrifice of a part, tho this was the object, there can be no contribution. Thus the goods of A are cast overboard in a gale to preserve the ship and cargo and the ship is lost in the same storm, now there can be no contribution to A, tho part of the goods remaining shd be saved from the wreck, for the goods thrown overboard did not conduce to save the others tho intended as a preservation. *Ibid*. *Thowers D. C. C. 20*

But if the ship is preserved by such sacrifice and is afterwards lost by a distinct cause, the effects that may be saved from the wreck, must contribute to A's loss. *Ibid*

If the goods of A are put on board of a lighter, to enable the ship to pass up a river or over a bar, and the goods on board of the lighter are lost, the owner of the ship and cargo saved must contribute to that loss. For A's goods were exposed to

to enable the ship and residue of Cargo to reach her port of destination.

But in this case, if the ship had been lost and the goods on board of the lighter saved, the owners of these goods wd not be bound to contribute, for the loss of the ship and cargo, did not preserve the goods in the lighter. *Mars 463.*

In case of an unlawful capture and detention, the wages and expenses of the seamen during the detention, is a subject of general contribution. The wages of the crew in the first instance, are a loss to the owners, but as they are incurred for the common benefit of all who have any interest on board, they are properly a subject of general average. *Burr 15th Mars 464. Beawes 159.*

And if a ship is obliged in consequence of sea damage, to seek a port to repair, the wages of the crew and every other expense incurred, while she is repairing, is brot into a general average. *27 R 407. Park 125.*

But to bring this ^{case} ~~rule~~ within the rule, the necessity of repairs must have been occasioned by extraordinary perils and not by ordinary wear and tear of the ship. *Park 125. Mars 464.*

The ship, freight, and every thing else that is deemed a part of the cargo, are subject to average contribution, where such contributions are claimable by Law, and money. Jewels and Plate where they form a part of the cargo, are also liable to these contributions. Any ornaments however, that are worn about the persons of those on board are not covered by the policy and therefore are not liable to such contributions.

To passengers and crew who own no part of the cargo are not liable to such contributions; for they form no.

Nor sailors for they own no part of the cargo.

Nor are they insurable by law, that is their wages.

27 R. 407. Mars 226. 466.

These contributions are to be adjusted by the captain, and it is a part of his duty to do it. These contributions may be demanded before the cargo is landed, and the Captain has a right to detain the cargo and prevent its being landed, till they are paid, for the owners have a lien upon the cargo for all average contributions, as well as freight. Beawes 1148. Mars 466.

And if the captain neglects this duty so that the parties do not eventually pay, an action will lie vs the captain, and her owners by each of the suffering parties. Tho on the other hand an action will lie vs those who are liable to pay the contributions. So that the suffering party has his election of remedies.

The better remedy is ^{by} bill in Equity brot vs all who are bound to contribute. This is the more summary mode, as a bill in Equity may include all, whereas at Law, they must be proceeded vs severally. 1. East 220. 12 How PC 619. Mar 466.7.

But in adjusting these contributions, the property lost must be taken into account, as well as that saved. The party by the sacrifice of whose property, the residue is saved, is not entitled to the whole value of what is lost, but the amount lost must be taken into the aggregate, so that he may bear his proportion of the loss. Mars 467. 8. For the mode of making the estimate, See Mars 467.

The property lost is estimated at the price, wh it wd have commanded at the port of destination or delivery on its arrival, if it had been saved. Ibid

For all these average contributions, the Insurer is liable or rather bound, by the words of the policy to indemnify the insured to the amount of his proportion, and this he is bound to do, an the insured has paid the amount or not
Marsh 468. C

Salvage. By one of the clauses in the policy, the insurer is

have for the expence of Salvage. By salvage, is here meant the allowance or compensation made to those who have saved the property, in case of disaster. Where some of the property is saved, the Insurer must indemnify the insured the amount paid by him, by way of Salvage, to those who saved a part or the whole of the property. Mars 239. 469. 712. 14

And those who saved the goods or any part of them from these perils, have a lien upon them for a reasonable salvage, till paid. 1. L R 393. Park 654. Mar 469.

As to the amount of salvage and the mode of ascertaining it, and enforcing the paymt of it, different rules prevail in different countries. In England, it is chiefly regulated by Statute Law. 7 Stats of Ann Geo 2, 3, See Mars 469. 474. 469 to 74.

In declaring on a policy to recover salvage paid, the insured does not allege a loss by paymt of salvage, but a loss by the particular cause wh occasioned the disaster, as perils of the sea. Stranding, Capture &c, and under such declaration he may recover the salvage paid, Mars 474. 595. 619.

Where it is necessary to have the question of salvage judicially settled, it can only be done in a Ct of Admiralty. As that Ct has the only original jurisdiction of the Question. but after that Ct has settled the amount to be paid, an action will lie in a Ct of C D to recover it. Mar 475. Abandonment.

Abandonmt is an act by wh the insured yields or relinquishes all his right to the insurer of what may be saved of the property in case of disaster. So that the insurer who is to pay for the whole loss, may make the most of what is saved.

And in all cases of total loss, where the property insured is not totally destroyed, The insured must abandon in order to entitle him to recover for a total loss. 1. R

615.16. 3 Alk 195. Mass 44.74. 500.6. 482.

On the property being abandoned, the Insurer stands ^{as} to what is saved in the place of the Insured, and of course is entitled to what is saved as his own property, for this act transfers the absolute title to the insurer. *Ibid.*

But where the subject is totally destroyed, an abandonment would be wholly nugatory and void, for in this case, there is nothing to abandon. Mass 479.

The most frequent ground of abandonment is capture and arrest of Princes.

Abandonment for Arrest of Princes—

But capture by an enemy, or pirate, or arrest of princes, by an embargo, or otherwise is prima facie a total loss, and immediately upon capture; or detention, or at any time while the detention continues, the insured may abandon, and if he does so, he must give notice to the insurer, for without such notice, there can be no abandonment. 2 Burr 696. 1 Esp R 237. Mass 422.29. 83. 501.

In the case of a major policy, there can be no abandonment, for there is in fact nothing to abandon—

But where there is an interest policy, the insured may abandon, the moment he has notice of the capture or detention, and this abandonment will bind the insurer, whatever may be the effect, ultimate effect of the detention. For an abandonment once effected, cannot be rescinded without the consent of both parties—1. 506. 304. Mass 106.

484

But a capture or arrest of Princes, does not necessarily result in a total loss, so as to warrant abandonment. For the insured can only abandon, where the loss is deemed in Law, total, if therefore the insured receives simultaneously the notice of detention, and restoration of the property, he cannot then abandon—2 Burr 1198. 1. 87 R 276. 1. Esp R 237. Mass 493. 97. 501. 523. 4.

one other reason, the Insurer having assumed the loss,
may have induced the insured not to abandon.

The Premium being entire, is absolute proof of an entire
Risk. I Could -

If however in consequence of the previous detention, the voyage sh^d be lost, he may abandon, but it wd be for a distinct cause. 1^o loss of the voyage. 2 Burr 683. 3 Alk 195. 2 Burr 1198.

If then in consequence of capture, the voyage be lost, or not worth pursuing or if the Salvage be very high, or if further expence is necessary to prosecute and the insurer refuses to pay it, the insured may abandon after the property is restored, for in all these cases the voyage is virtually lost. 3 Alk 195. Park 98. Mass 479. 485. 49. 500.

On this subject it is a rule, if after capture, and recapture and before abandonment, the subject is recovered, and no loss has been paid by the Insurer, the insured can recover only for the loss wh^h he has actually sustained.

Thus a ship is captured and before any abandonment, she is recaptured and restored, the insured cannot then abandon and the insurer is liable only to the actual amount of loss. If however the insurer has paid the loss, or part of it, he by so doing has acquiesced in the loss and will be liable for a total loss. 2 Burr 1198.

The principle of the Rule is, yt where the insured has not abandoned, where he has a right so to do, he has no vested right to claim paymt for a total loss, but only for the loss actually sustained. 1. Esp R 237. Mass 485. 581.

* But where the Insurer has acquiesced in a total loss, by paying it, or a part of it, he is liable for a total loss. Tho' there has been no abandonment, he has the same rights however, that he wd have had, if the insured had abandoned i.e. that is he is entitled to all the property saved.

This Rule is founded upon the general principle "Volenti non fit injuria", the payment being voluntary, and obtained without fraud, the party paying it, can't after recover

it back, for he sh^d have resisted claim. 1. BlB 276. Mars 485-97.

But a right of restitution ^{recovering} according to the insured, upon recapture, cannot defeat his right to a subsequent abandonment, ^{proviso} the ship is unfit to finish the voyage, for here is an additional reason for abandonment, that is loss of voyage - 2 Beawes 683. 2 Burr 683. Mars 487. and the insured may abandon upon a mere arrest or detention by a Prince, not an enemy as well as by Capture. 2 Burr 683. Mars 488.

However where a capture proved but a small temporary hindrance, as where the ship was detained one hour or two, and then discharged, it was determined, that the insured ed not abandon on the principle, "De minimis non curat Lex" 2 Burr 683. Mars 487.

But the insured can never by abandoning, turn a loss wh the Law deems partial, into a total loss, where the loss is not prima facie, & total, the act of abandonment can never make ^{it} so. Ibid 2 Burr 1183-98. 1. BlB 276.

If a captured ship is recaptured and the captain being restored to possession, sells the property bona fide for the benefit of all concerned to pay the salvage, the insured may abandon and recover as for a total loss. for the property being sold, the voyage is of course lost. Doug 219. Mar 377. 8. 498. 527.

The captain in case of disaster, has an implied authority to act as he in his judgment, thinks best for all concerned and by his acts the insurer is bound. Doug 219. 1. BlB 611. Mars 378. 500. 378.

If on a ship's being captured and condemned, the Captain repurchases the ship, as agent for his owners, where she is offered for sale by the Captors, this repurchase is

Considered as a recovery by the owners, and the price paid as the amount of Salvage, for wh the insurer is liable, and further if on such repurchase, the voyage is still north pursuing and there has been no abandonment, the loss is only partial, for the captain is bound to pursue the voyage. 1 EspR 237. Mass 501.

Shipwreck is in general a total loss of the ship, By shipwreck is meant a loss of the ship by the perils of the seas, foundering &c.

Now the wreck may in such cases remain and be saved, but where the wreck is so broken up, as no longer to exist in its original character of a ship, the loss is considered total. Mass 502.

And if the cargo shd in such cases remain, yet if no other ship can be procured by the Captain within a reasonable time, in order to convey the cargo to the port of destination the loss will be deemed total as to the cargo, and of course if the cargo is entire and uninjured, the insured may abandon and recover for a total loss. Doug 219. 1 McEll Park 19. 209. Mass 378. 498. 502. 27. 502. 27. Park 290.

Stranding by itself is not a total loss, tho it may be followed by a total loss. But if the ship is set afloat and is capable of pursuing her voyage, the loss is only partial. Ibid.

But if the stranding occasion shipwreck, or renders the ship incapable of prosecuting the voyage, the insured may abandon, the voyage being lost, the loss is total. Mass 502.

To warrant an abandonment in any case, there must have been ^{at} some period of the voyage, what the law deems a total loss. Therefore where a ship performed her voyage - but was so shattered, & as not to be worthe repairing, the loss was abandoned as partial only. For in this case

neither the voyage, nor of the ship was lost. 1. TR 187.
Mass 502.3

But where the voyage is lost, the loss is deemed in Law, total, and the insured may abandon however slight may be the pecuniary loss.

Thus where an insurance was effected on a ship, cargo, and freight, and she was obliged to turn back in consequence of a leak, and repairs could not be obtained at the port, whence she sailed and no other ship could be obtained in a reasonable time, the loss was held to be total, as to the ship-cargo, and freight. Park 160. Mass 505-414.414-

If the cargo is so much damaged, as to be worth less than the freight, that is, the price of transportation, the loss is total. For the adventure is wholly lost to the owners. Strang 1065. Mass 144. 486. 507. 531-

TIME OF Abandoning-

As to the time of abandoning, the rule is, that as soon as the insured has advice of a total loss, he must make his election, either to abandon or not, and if he resolve to abandon he must give notice, of his determination within a reasonable time, to the insurer, and any unnecessary delay in giving this notice, will be regarded as a waiver of his right to abandon, Mass 508.9. 511. 513-1. TR 608.

If then he does not give the notice required by this rule, the loss will be deemed only partial, whatever may be the extent of the damage. Ibid

But untill the insured is informed of the loss, no act of the Capt will prejudice his right to abandon-

But if upon such advice, being given, the insured neglects to abandon, as the rule requires, he cannot afterwards avail himself of that right, and the

insured, then adopts as his own the acts of the Master
 5 B 608. Park 172. Mars 510, 537, 30. 527, 13.

Upon abandonment, the insurers cannot demand more
 than they insured, nor can such demand prevent the insured
 from abandoning, from demanding to the amount. Thus a ship
 worth 500,000, but is underwritten for only 150,000, if
 and is captured, the insurer is willing to take the loss
 as total, proviso, the insured will abandon the whole.
 Now the insured may abandon as to half, and this will
 bind the insurers, then if the ship is worth more than that
 sum, they are tenants in Common. 5 B 268. Mars 513, 14, 15.

If the insurers in any way prevent the insured from abandon-
 -ing, the insured may claim and recover as for a total loss.
 Therefore where the insurer dissuaded the insured from
 abandoning, by offering and ordering the necessary repairs,
 and afterwards refuses to pay for them, it was held, that
 the insured might recover as for a total loss. 2 B 407.
 Mars 516

There is no particular form in wh the abandonment
 is to be made, but there must be a specific declaration made
 by the insured to the insurer, that he does abandon. 1 B 6
 72. Mars 517, 19.

This notice may be given to the insurer himself
 or his agent, who subscribes the policy for him. Mars 519.
 Where the insurance is entire for one premium, upon the
 whole of one subject or different subjects, in the aggregate,
 the insured cannot abandon for a part only, but must
 abandon for the whole or nothing.

But if different articles are insured in different policies,
 or by different valuations in the same policy, the rule
 is otherwise. Thus where a cargo of sugar or cotton were
 insured, and the insurer underwrote, 8,000, on the sugar
 and 1000, on the cotton, in this case the insured may abandon
 for the one, and retain for the other. For it is virtually

2 distinct policies. *Ibid.*

The Rule is the same, where the insurance is on a ship, and cargo distinguishing the amount insured upon each. *Ibid.*
But the abandonment must always be unconditional, for if it is offered conditionally, it does not transfer the absolute entire property.

As if on capture of a ship, the insured abandoned on condition, y^t if she be recaptured, or restored, y^t the property shall revert to him. This is not valid, because uncertain.
Ibid. Mass 518.19.

An abandonment then transfers the property saved to the insurers in proportion to their several subscriptions, and as to what is saved, they are tenants in Common.

This proposition obtains witht any regard to priority of policies, where there are more than one, and witht regard to priority of subscriptions to the same policy. *Ibid.*

Mass 519.20.

If after a loss is paid by the insurer, compensation is made to the insured for the injury wh occasioned the loss, the Insurer is entitled to that compensation, and he may recover it in an action vs the insured. 1. Vesey 89. 98. Mass 523.

But tho the property shd be recovered uninjured after a total loss is paid, the insurer cannot for this cause, compel the insured to take back the property and refund the money paid, For abandonment when properly made, is irrevocable unless by mutual consent. 4 Burr 1966. Mass 524.

In case of disaster, the effects saved, continue till abandonment the property of the insured; and he is bound to do his utmost to preserve and make the most of the property. This is required as an act of Justice to the insurer, and the expenses, wh he thus incurs, are to be ultimately born by the insurers, and the Capt, factor or agent, who is on the ground, has the implea authority to do so, if he thinks best. 1. T.R. 608. Doug 219. Mass. 500. 9. 26. 7.

And the capt in case of disaster, if he thinks best, may sell the property or exchange it for other, and this act will bind the insurers, 12. the original policy will cover the goods received in exchange. Doug 219. 1. TR 611 N. Maloy 527. 498. 378.7.

If the insurers after notice of of abandonment by the insured, suffer the Capt to continue in the management of the ship, or other property, he then becomes their agent and they are bound by his acts. 1. TR 608. Mars 511. 27.

The sailors in case of disaster, are bound to do their utmost to save the property, and by so doing they are entitled to wages, so far as the property saved will allow, but if they neglect their duty in this case, they forfeit their entire claim to wages. Mars 528.

Adjustment of Loss.

Where the loss is total, and the policy a valued one, the insured is entitled to the whole sum insured, subject to such deductions as may ^{have} ^{been} agreed upon in the Policy - For the valuation in the policy is equivalent to an admission at the trial, that the value of the property is as stated in the policy - 2 Burr 1171. Mars 103-5. 130.

If he has not subscribed to the amount of the policy-valuation, the amount wh he must pay, must be in proportion to his subscription, as the loss is to the valuation.

In other words, the insured is bound to pay, in case of a total loss, to the amount of his subscription - 2 Burr 1171. Park 1. 103. Mars 199. 200. 103. 530.

Upon an Open policy, the insured must prove, not only, 1st the goods were put on board, but also the value of them. So if the ship be insured, the insured must prove the value of the ship, and the value not excluding the sum insured, the insurer is bound to pay, if the loss be total, but if the subscription be not equal to the value, he must pay

to the amount of his subscription, 2 Burr 1171, Mars 199, 531. 612-612. In case of a partial loss, the insured must prove the amount of loss, as the policy is open or valued. The valuation shows only the amount of the whole property- Ibid.

When there is a total loss of one or more distinct articles, or parcels out of a number, and the articles lost admit of a separate valuation, the Insurer is liable as for a total loss upon those articles. So that the insured recovers for a total loss upon them, and not for a partial loss upon the whole. 2 Burr 1170, Mars 531.

When part of the goods are saved and exceed in amount the value of the freight, the rule in adjusting the loss, is, to deduct the amount of the freight from the part saved, and then the difference between the remainder and the whole saved value of the property, is the amount lost. Thus the whole value of the cargo \$10,000, the amount saved \$500, price of the freight 1000. According to this rule, subtract from the property & saved, viz. \$500, the amount of freight \$1000, wh leaves 4000. Then the difference between the whole amount, and this sum is 6000,, wh is the amount of loss. Mars 144 507. 31.

But where the goods or part of them are merely damaged the amount of the loss is the difference between the value of the goods in their damaged state and their prime cost. Mars 531.

If there is a clause, that the Insurer shall be free from partial loss arising from a particular risk, where the loss is less than so much per cent: The proportion of the loss to the cargo must be calculated from the cargo on board on at the time of the loss, and not the amount that was on board at a former time. Thus suppose an insurance upon a cargo of slaves, 200 in number, free from partial loss under

under 5 per cent, arising from insurrections, and there is an insurrection in wh seven of the slaves are killed, but at the time there were but 50 on board, the others being dead or disposed of before. Now 7 is less than 5 per cent upon 200, yet it being more than 5 per cent on the 50, the number on board at the time of insurrection, the insurers are liable notwithstanding this clause— 1. Esp R 444. Mars 532.

But in valuing goods insured, the prime cost is not in all cases the true value i.e. the rule of "Thus in case of a general average, the goods lost contribute not at Prime cost, but according to the prices for wh they might have been sold at the time of settling the average Mars 467. 532.

In settling a total loss upon goods upon an Open policy, the English Rule of valuation is this: including the prime cost, all duties and expences accruing before they are put on board, together with the Premium of insurance. 1. Esp R 477. Park 104. Mars 534. 534.

"The duties, expences, and premium are included, because these duties and expences wh accrue on goods before they are put on board together with the premium of insurance, are part of what the goods cost the insured when ~~in~~ shipped. And the Rule is the same, where the loss is partial.

A ship is estimated on an open policy, at the price, she will bring at the time of sailing, including the expences for repairs, valuations of the furniture, provisions, stores, money advanced to seamen, and in general every other expence of outfit, together with the premium of insurance Mars 200. 535.

Partial loss on goods upon a valued policy— is yet proportion to the value stated in the policy, wh the diminution in value bears to the price of sound goods in the port of delivery. Mars 535-40. 612. 2 Burr 1167.

The insurers duty to pay the loss, accrues immediately upon the ship's arrival and landing of her cargo at the port of delivery. 12. it then becomes his duty to pay the loss, when it is ascertained. 2 Burr 1167. 539. Mars 529.

When a loss has happened, a written agreement stating the amount endorsed on the policy, and signed by the Insurer with a promise to pay the amount, is *Prima Facie* evidence and all the insured is bound to prove. He has only to prove the execution of the written adjustment, and then if the written adjustment cannot be impeached, the insured will recover without further proof of the policy - Mars 542. 3. Beaves 300, 10. Mars 525. 4.

This adjustment may be impeached for fraud or plain mistake, such as concealment 1. EspR 468. Park 118. Mars 543. 4. This written adjustment may be given in evidence under common declaration upon the policy, for it will support the usual count, or it may itself be sued upon as a Note of hand. Mars 544. 88. Park 118. 575.

Return of the Premium

In many cases the insured has a right to recover back the premium. The premium paid, and risk assumed are mutual considerations for each other. The insurer is not liable for a risk without a premium, nor can he retain the Premium without incurring the risk. 2 Burr 1008. 3 do 1240. Coup 688. 68. Doug 454. 3 JPB 266. 3 Burr 1240.

If a premium has been paid to an insurer, in a case in which the risk has never attached, the premium is held by the Insurer to the use of the Insured, and the proper action for recovering it, is ~~re~~ for money had and received. 2 Burr 1008. Doug 454. Coup 688.

A return of premium must be made, when the policy is

"ab initio void" For then neither party can acquire a right under it, whatever in general void renders any other contract void, will make this so. Park 263. Mars 103. 549.

Premiums in wagering policies, must ~~on~~ whenever such policies are invalid, be returned to the Insured Ibid

It is a general rule, that if by mistake or any other innocent cause, insurance is made witht any interest in the insured, the premium may be recovered back. Park 349. 67.

Where there is no interest the whole premium must be returned -

If there be a small interest in proportion to the insurance, a ratable part of the premium must be returned - and if there are several insurers they are to refund witht any regard to the priority of their subscriptions. Mars 115. 550.

But tho' the rule is general, that where the contract is void, the premium must be returned, yet it is not universal. Where there is an illegal insurance of such a kind, y^t the insured is deemed 'particeps Criminis, he can't recover it back, as between such parties, the law stands Neutral. 5 TR 405. 8. Do 575. Mars 556. 7. 560. 1. B et P 298. Doug 541. 696. 3 East 222. 4 Do 96. Mar 550.

^{Under} many circumstances, the insured might at any time, have been liable for the whole sum insured, there can be no return of premium or any part of it. So far as the risk attaches, the insurer is entitled to retain the premium.

Hence if Captors of a ship insure their interest in it, there will be no return of the premium, tho' the property shd afterwards be adjudged no prize. For from the time of the capture, till the time of adjudging the ship, no prize, the insurer was liable, therefore he was not obliged to return the premium - Mars 554. 1 TR 254.

Where no risk is incurred, the premium

cannot be retained, - thus if the insured does not comply with a warranty, express or implied - as to sail with Convoy the policy is void ab initio, and the premium must be returned. The premium may be and frequently is recovered in an action on the Policy itself, but it can't be recovered back on a special count founded on the policy. *Mars 556. 8. 99. 99.*

If the policy is void, by reason of the fraud of the insurer, the insured a fortiori, is entitled to a restoration of the premium - *1 Bl R 594 3. 5. 3 Burr 1909. Mars 352 3. 558. 9.*

But where the policy is void, by reason of fraud on the part of the Insured, the rule is now well settled, y^t he is not entitled to a restoration of the Premium. *Aliter formerly - Park 218. Mars 558. 563. 2 Vern 206. Prec Ch 20. 2 P Willeam 170. 3 Burr 1364.* *Precedents in Chancery.*

II If from any cause the risk is never began, tho' the contract was originally valid, the premium must be refunded, for the consideration on w^h it was paid, has failed.

3 Burr 1237. 1. Bet P 172. 8 John 1. Mars 564. 74. 5.

If the risk once commences, the Premium is retained.

But where the voyage is divisible into several distinct risks, so as virtually to constitute several distinct voyages, the premium may be apportioned according to the several risks, so that if one of those several risks never commences the amount of premium apportioned to that risk, must be refunded.

Thus an insurance was effected on a voyage from London to Halifax, warranted to sail with convoy from Portsmouth, but on her arrival the convoy was gone, it was decided, that the premium shd be apportioned and so much of it as was applicable to the voyage from Portsmouth to Halifax, shd be returned, for the risk then ended.

On the principle, that the contingency in the

in the warranty to sail with Convoy from Portsmouth divided the risk and the voyage, so that the whole was considered as making 2 voyages, the 1. ~~from~~ to P, the other, from P to H, and the risk on the latter had not commenced, nor could it so as to bind the insurers, the Warranty being a condition precedent. The apportionment is left to the discretion of the Jury. *Ibid.*

Where there is an insurance at and from a given port, the risk is not divisible. *Mars 56. 8. 8. & John 1.*
 Upon an insurance at and from a given port, with warranty to sail before a given day, or with convoy, and the warranty is broken, if there is a usage to allow a certain premium or per Ct, the usage will govern and an apportionment will be made. *Mars 19. 172. 26. 392. 404. 570. 626.*

But where the risk is entire and indivisible and has once commenced, the general rule is, there can be no ^{return} ~~apportionment~~ of premium. If therefore the ship merely sails on her voyage, the risk is commenced, and being entire, the whole premium is earned, tho' she shd be obliged to return and then abandon the voyage, and if she shd deviate within ever so short a time, after sailing, the whole premium will be retained, tho' the deviation discharges the insurer. *Doug 75. Mars 57. 74.*

The risk and premium being entire, the rule holds, tho' the voyage be to several distinct ports. *Ibid.*

So where the insurance is for a certain period of time, for an entire premium, the risk being once commenced, there can be no return of Premium, tho' the insurance shd be determined by some event immediately *Coro 66. Doug 57. 64. Mar 54. 74. 8.*

Indeed in all questions of apportionment, the fact that the premium is entire, is a strong presumption, that the risk was intended to be so. *Ibid.*

Further an insurance for a given time or period of time, as one year, with a gross sum as 60% for the premium, tho' it is expressed to be at the rate of 5% per month, the whole 60% will be retained, tho' the ship shd be lost one month after the execution of the policy, for the clause "at the rate of" is regarded as only one mode to express the sum - or of expressing or computing the gross sum -

If however the insurance had been for one year at or for 5 adls. per month, witht any gross sum and omitting the words at the rate, the premium wd be divisible -
Doug 564. Mars 578.9.

Or were the insurance for one calendar year, at 85 at the month and 5 for the 2 months E3c, the risk wd be divisible.

So where the insurance is upon a voyage, so much for one part and so much for the other part: it is divisible -

It is often agreed in the policy, that part of the premium shd be returned on the performance of some stipulation or condition by the insured, &g. as where 12. per cent is the premium on a vessel from Nly to Dublin, on condition that 5 per cent, shall be returned, if the ship sail with convoy.

In this case, if the condition be complied with, the 5 per cent must be returned.

Further if the insurance be on goods at 10. per cent under any agreement that 5 per cent shall be returned, if she sails with Convoy and arrives at the port of destination, in this case the 5 per cent must be restored, if the ship sails with convoy and arrives, tho' the goods are totally lost. Doug 255.

Mars 581.

Again an insurer upon freight with an agreement, that if she sails with Convoy, and arrives in port, and she sails with convoy and arrives in port, that a part of the premium shall be returned, and the ship is captured and recaptured, and finally arrived

in port, it was held, that the premium must be returned according to the agreement, when the Insurers were subjected to pay Salvage.

7 F.R. 421. Mars 581.2.

In all these cases, when the Law requires the whole premium to be returned, it is the usage in all mercantile countries to allow the Insurer to retain 1. half per cent for his trouble and disappointment. Mars 583.4.

The Proceedings on Policy.

The sole original jurisdiction in matters of insurance is in Cts of C.D. The question of prize is indeed cognisable only in Cts of Admiralty. But the policy being a common contract, the original jurisdiction ~~on~~ is in Cts of C.D.

Cts of Equity may however on collateral grounds, hold jurisdiction of cases of insurance, where equity ~~can~~ only can relieve, as it may in all other cases of contracts. 1. 9th 45. 2 ibid 357. 3 B.C. 525. Mars 556.

It is very usual to insert a clause in the policy - that a submission of the parties shall submit all differences to arbitrators, yet award in pursuance of such an agreement, cannot oust the parties of their right of action in a Ct of Justice. This is wholly nugatory. Burr 1082. 1. Wils 129. Mars 5867. 'Tis against the policy of the law

& man cannot shut the doors of justice to himself. In an action on an unsealed policy, the proper form of action is in special ass't, 1st ass't founded on the policy.

On the other hand, if the policy is sealed, as is always the case when made by a company, the proper action is debt or covenant broken. In debt if the damages are certain, in Covenant broken, if uncertain Mars 587.8. See 2. Chit Pleading. Title policy of insurance in the Index.

In almost every action upon the policy, there is a common count for money had and received. This is inserted out of abundant ^{caution} to enable the Plaintiff to recover back the premium, if upon proof he should be entitled to that, and no more. Mars 588.

Assent of Interest

The assent of interest in the Plaintiff may be general or special. 1st. he may state in general terms, that he has an interest in the subject, or a particular interest in it.

If the allegation is general, he may prove any interest, he may happen to have in the property. ~~The~~ If he avers a special interest he can prove only the particular interest stated. The former mode is therefore the most prudent. 8 T.R. 13. Mass 86. 589. 612. 630.

If the insurance is made in the name of the Agent, who procures it, an action on the policy may be maintained, either in the name of the Agent, or that of the principal, averring, that the person named acted as Agent, and this is the case with most maritime contracts. Bet-P 345. 2 Con R. 91. 2 Ch 71.

In either case it must be averred, that the policy was made by the agent, as agent for the use of the Principal. Mass 589. If A the owner ^{or ship} sells 1 half of it to B. and then insures it in his own sole name, an aversment of interest in himself with any notice of B. is sufficient, for the fact that B. has any interest, does not disprove A's interest. 2 Bet-P 240 Mass 590-1.

In alleging the loss, the Pltff must ascribe it to its true proximate cause. If he shd aver a loss by capture, and prove a loss by tempest, there wd be a fatal variance. 1 T.R. 304. Mass 591. 2. 3. 436. 216. 147. 4 T.R. 304. 2 N.R. 336. Park 62.

But the loss need not be alleged in the very words of the Policy, it is sufficient, if it be alleged in words, that bring the loss within the policy. Thus were the loss was by Pirates, it is sufficient to allege that it was occasioned by the ^{pirates} loss of the Master. La Ray 1329. Strong 581. Mass 443. 595.

And if Salvage is to be recovered, it is sufficient to allege, or impute the disaster y^t caused the loss. Hardwick 364. Mass 474 595-619.

The most usual plea to an action of Afft on the policy, is the general issue, or non Afft. This compels the Pltff to prove every material allegation in the dec^r

and enables the Def to prove any fact wh dissaffirms the contract and discharges the demand, Doug 186. B. N. P. Bull. N. P. 152. Mars 197 597. 8.

Thus under the general issue, the Def. may prove that the contract was illegal, that it was obtained by fraud - or y^t the ship was not Seaworthy, or that the voyage insured was not in fact, the voyage contemplated, or that the ship made a deviation, or he may plead noncompliance with the warranty express or implied - or that he has recovered already.

He may also plead tender, where the amount is ascertained - or under the general issue may bring the money into Ct. This last is the rule in England, tho' ~~not~~ in this Country - Marsh 599. 600.

But in debt or Cost broken ^{on} a sealed policy all special matters of defence must be specially pleaded. For the Plea non est factum, denies only the making of the bonds - and all the above facts, wh in Ast may be given in evi under the general issue, must be specially pleaded, to an action of debt or Cost broken - Mars 600. 1. and Title Pleading - deviation Declaration - 5 Coke 119.

When several actions are depending together vs several Defs on the same policy - the several actions may be cone only, where solidicated into one action by a rule of Ct. For the different wh defences are insurers may not be sued together. This rule of Ct he same, and subpends the proceeding in all the actions, except one and not where one binds the defs in all the others, to abide the event of a special the particular suit. This is a Modern Rule of practice reference, wh the and was formerly unknown - 3 Burr 1477. 1 Bl R 464. there have not Mar 602. Barridston 201. Park introduction 50. in this case, there

But as a condition in granting in this Rule, (the un be no con- power being discretionary with the Ct, & they may impose solidation - & C. reasonable terms on the def^s - as the Defs generally bring

the motion, as that none of the Defs shall apply to a Ct of Equity for relief - or that none of them shall bring a writ of Error, ^{if they shall} or produce certain documents in their possession, or make certain admissions - at the trial. 9 Mass

319.

604-

But the Cts can't make this Rule absolutely w^o the consent of the parties, if the Plts refuse however, they will order or grant successive continuances on all but one of the actions, till the delay will induce him to consent and if any of the Defs refuse, the Ct will order or permit the actions w^o them to proceed immediately. 1. Hb B 464.

Mass 604

If one of the conditions is, that none of Defs shall bring a writ of Error, a writ of Error brot by one of them, is a contempt - ^{1st} the party can show a manifest Error in the proceedings. 1. Hb B 21. 3 Burr 1437.

Mar 605.

The principal points to be proved in an action on the policy are the 5 following viz. I. the contract itself - 2^d the payment of premium, 3^d the interest of the Insured, ^{over} ~~over~~ interest is required, 4. the performance of all of all the warranties 5th the loss.

II The contract is proved, by proving the execution of the policy and no parol Evi is admissible to contradict or explain away the terms of it. 2d Holt, indeed once said, y^t a policy might be varied by parol Evi, but he was evidently mistaken. Salk 444, denied in Skin 454. Mass 209. 47. 608.9.

Upon doubtful points the usage may be proved as explanatory of the obscure clause - but the opinions of witnesses as to its probable meaning, are inadmissible. Doug 572. Mar 609. 10. 360.

II. The clause in the policy confessing the receipt of the Premium is of itself sufficient evidence to support the action.

This clause is
sufficient evi of
a consideration will take notice, yet it was inserted pro forma. And
that is, sufficient
to support the
action on the
policy. & C.

Tho if the Premium is not in fact paid, this acknowledgment
will not preclude the Insurer from recovering it, as the Ct
a consideration will take notice, yet it was inserted pro forma. And

III. The interest of the insured may be proved like any
other ordinary fact. It may be proved by written documents
wh are evi of property. As an invoice of the Goods, bill
of Lading, by bill of charges in the outfit - by customs
house Records, By acts of ownership, by Parcel evi., Strange
1127. 1 Esp R 373. 209. Marsh. 611. 12.

Upon a policy on goods, generally the insured may give
evi of a Mortgage or Lien upon them,, On such general
allegations, it is sufficient to prove any kind of Lien. 1. Bl 46 42 423.
Marsh 225. 613.

IV. The truth of an affirmati^{ve} Warranty must be
strictly proved by the Insured - as must also the performance
of an executory Warranty. That the property is Neutral
is a ^{positive} Affirm^{ative} Warranty and must be proved true. That the
Ship shall sail "on or before" a given day, is an executory
Warranty, the performance of wh must also be proved.
Marsh 285. 328. 614.

V. The loss must be proved to have happened during the
continuance of the Risk. Marsh 165. 615.

This fact of course may be proved by the testimony of
witnesses, like any other ordinary fact. But the best
proof of what goods were on board, is the Bill of Lading.
wh if unimpeached is regarded in all commercial
countries, as conclusive of the quantity and species of the
goods on board. Marsh 615 & 616.

But the insurer may impeach the bill of Lading, for
any fraud or collusion between the Capt and insured or
for any fraud in the insured alone, but if he do not
impeach it, it is conclusive upon him.

Bill of Lading is an instrument signed by the Capt acknowledging the receipt of goods on board to be transported to such a place. It generally runs thus. Shipped in good order and well conditioned on board the good Ship — of wh- is master- now lying in the port of — bound to the port of — mentioning the number of Packages boxes- with their marks or names- ^{not} and the same ^{um} pd per box, Bbl &c for transportation. Mars 615-

No loss can be proved to any effect, unless it is the immediate consequence of some peril covered by the policy. Esp R 441. 6 TR 656. Park 55. Mars 133. 4. 418. 617. 20.

But the Pltff may prove any loss proceeding unusually from the alleged cause of loss, as the payment of salvage — occasioned by Stranding. Hardwick 304. Mars 619. 20.

If a ship is driven by stress of weather upon a hostile shore and is there captured, the Pltff cannot recover on an allegation of loss by the perils of the sea, that being the remote cause — and the capture the proximate cause of loss. Peak 212-

Wages or provisions expended or consumed during the repair of sea damages, is not a loss within the policy upon the ship — but it is said that the loss is to be borne by the freight and of course is recoverable of the insurers of the Freight Park 52. 4- 5. Mars 621. andlogy 1. TR 137.

I G. does not understand the principle of this Rule —

But it is admitted that they are a part of the ship and are protected by an insurance on the ship —

Further if they are injured by sea damage, a recovery may be had by the insurers of the Ship, for this is an immediate consequence of one of the perils insured vs.

4 TR 606. Mars 622. 20- 4 TR 206.

Quere. don't this explain the former Rule —

If the Pltff alleges a total loss, he may prove and recover for a partial loss. He may always recover less than he claims, where damages only are to be recovered. And if he declares for the loss of an entire subject, when he is owner of a part only, he may recover pro tanto.
 2 Burr. 904. 1 Bl R 198. Mars 629.30. 589.612. Park 402.

Bottomry & Respondentia Contracts.

Bottomry is a contract in the nature of a Mortgage, of a ship, on wh the owner borrows money to procure an outfit or a cargo for a voyage, and pledges the bottom of the ship. "Pars pro toto loto," as a security for the payment of the loan, 2 Bl. 458. Mars 93.625.

The reason, why the marine interest is allowed, is, that the lender shall lose his entire principal & interest, but if the ship arrives in safety, he shall be repaid his principal with interest ^{at the rate} ~~at the rate~~ established by Law. In these contracts, the marine interest, wh may exceed the rate established by Law to any extent. Mars 718.

So far as the question of Usury may occur under such a contract, vide Title Usury—
 of this contract

The effect is, y^t not only the ship and tackle, but also the person of the borrower will be liable for the principal & marine interest, if she arrive safe. 2 Bl 258. 458. Seans if she is lost.

Where the subject pledged for the loan is the cargo on board and not the ship, the contract is called "Respondentia." For these from their nature must be sold or exchanged in the course of the voyage. Under this Contract the principal security for the loan, is the person of the borrower, or his personal responsibility.

And a bona purchaser will hold the goods vs y^e the pawnor. The cargo then is pledged principally for the purpose

of creating a risk. 2 Plb 458, Mars 633.

In this as in the former case, if the property does not reach the port of destination, the whole loan and interest is lost. If however the loan is for the outward & homeward voyage - the return cargo and the money need for the original cargo, is liable to the lender for the loan and marine interest. 2 Plb 258, Mars 633.

In the contract of Bottomry, the loan and interest become payable on the safe arrival of the ship. In Respondentia on the safe arrival of the cargo.

But it is of the very essence of these premiums contracts, yet the whole premium be exposed to the perils of the sea, at the risk of the Lender. After the contract is ruinous and void. Mars 634.

Bottomry differs materially from a simple loan. In a loan, the money is at the risk of the borrower, and must be repaid at all events: but in Bottomry is at the risk of the lender during the voyage. But upon a loan, only legal interest can be reserved, But on Bottomry, any interest however great, may reserved.

The analogy between the contract of Insurance and those of Bottomry and Respondentia, is much stronger.

In the one, the lender, in the other, the Insurer is liable for the perils of the sea. The one receives the marine interest, the other, the premium for the risk, wh varies in each, according to the length and danger of the voyage. Both are generally exposed to the same perils. Nor can the Premium in the one case, nor the interest in the other, be retained or recovered, if the risk never commences. Mars 635. The one may have the ordinary interest for the detention of the money - if the risk never attaches -

. A clause exempting the lender from any of the common perils, will make the contract, illegal and void. Mars 636.

This description of Contracts is ^{not} now used in this Country. Of course a more particular description of them, is unnecessary -

Insurance upon Lives

The principles of Marine insurance govern all insurances -
 Insurance upon Life, is a contract, by wh the insurer in consideration of a premium, engages to pay the person, for whose benefit, the contract is made, a sum of money on the death of the person whose life is insured, or where the insurance is for a limited time, if the person dies within that time. Mass 664. 722. Park 429.

In these cases, the money to be pd by the insurer, often consists of an annuity for a certain period, or for life.

If the insurance is for life, the money is payable immediately on the death of the person, whose life is insured, but if for a limited period, there is no loss to be pd at any event, unless the person dies within the time limited.

This Contract is usually qualified with a condition or warranty on the part of the insured, yet the person whose life is insured has then no disease tending to shorten his life, that he has or has not had the Small Pox, that his age does not exceed a certain number of years, and this condition imports, that if any of the warranties prove untrue, the contract shall be void, and the money to be pd by the insurer forfeited. *Ibid* Mass 667.

But this warranty that the person has no disease tending to shorten life, does not imply, yet he has no infirmity or indisposition whatever - but the warranty is considered replete, if the person has good health for one of his age. and condition -

And tho he may have had a particular infirmity, yet if it did not tend to shorten life, or did not in fact contribute to his death, the condition is complied with. 1. Bl 312. Mass 667. 670. Thus a local palsy caused by a wound, or a lability to the Gout, is no breach of the condition - *Ibid*. Mass 667. 70. 1. Bl 312.

If there is no warranty to this effect, the insurer assumes the risk, whatever may be the party's health, unless there

some fraud, as wilful misrepresentation or wilful concealment on the part of the insured, in wh case the contract is void. *Mars 670. 336. Park 437.*

By the Eng Statutes, an insurance upon any life, in wh the insured has no interest, is void, it being considered as Gaming Policy. But I conceive such insurance wd be void on C. L. principles, being contrary to good morals, and good policy. For such contract gives the insured, an interest in the speedy death of a 3^d person. Tho by enacting y^s statute, it seems, that it was not so considered, in England. *Mars 672. 3.*

By Statute of 14 Geo III, 1774

It is agreed, however, that a bona fide creditor has an insurable interest in the life of his debtor. Under this Statute, at least, he has such an interest, where he has only the personal responsibility of the debtor for the debt. *Mars 672. 75. Park 432.*

But if the debt is otherwise amply secured, the Creditor, has no such insurable interest. *Ibid.*

To warrant such an insurance in any case, the debt must be bona fides and upon good and legal consideration, otherwise the insurance will be void. Hence the holder of a Note given for money illegally won at Gaming, has no insurable interest in the life of the Maker, and in an action on the policy, the Def may aver that it was given for a gambling debt, wh will effectually bar a recovery. *Ibid. Park 432.*

But it is no objection to such an insurance; yt the debtor was an infant and not bound by Law, to pay the debt. For the Debtor might not have availed himself of this defence. *Ibid.*

The Trustees of a Creditor may insure the life of the debtor, for the benefit of the Creditor. Hence the Ex^r or Ad^r of a testator or intestate may insure the life of his debtor for the benefit of his Creditors. *Peake R 127. Mars 576.*

The loss upon this contract, if any, must necessarily be total. *Mars 677.*

The most usual exceptions in favour of the Insurer, where the insurance is upon the life of the party insured, are these viz That he shall not depart the limits of Europe, 2^d if he dies beyond the seas 3^d that if he enter into any military or naval service without insurers consent, 4th if he die by Suicide or duelling, 5th by the hand of Justice, The insurance is void in these cases. Cowp 667. Doug 658. 9. Mars 677. 722. Cowp 669.

And if if the insured die by suicide or duelling no return of Premium is demandable. for it is his own fault, that his death happened without the policy. Ibid.

Where one procures insurance upon the life of another, death by the hand of Justice, Suicide, Duelling, is not generally excepted. For the insured can't prevent such death by his own acts. if however it is excepted, will discharge the Insurer. Mars 667.

Where the insurance is for a limited period, not only the cause of death, but the death itself must have happened before the limited period expires, or the insurer is discharged.

Hence if a persons life is insured for a limited period of time, and he receives his death wound before, but survives the period insured, the insurers are not liable. 1. TR 254. Mars 677. 8. 177. 174.

Whenever it is uncertain when the death happened and an it was within the time limited or not, is a Question for the Jury to decide, it being mere matter of fact.

But I shd conceive from analogy at least, y^t where a person has been absent and unheard of, for seven yrs, that his death wd be presumed. unless there is something to rebut the presumption. The analogies to wh I allude, are the cases of Bigamy. lease on lives. and the Question of Divorce. in all these cases, after an absence of 7. yrs. in wh. time, if the person has not been heard of, or heard under such circumstances as to confirm the presumption, his death is presumed. The 2 first by the Eng Stats. 1. James 1. and 19. Ch. 2.

The last Stat of this Country - 6 East 85. 4 Dec 164.
In a policy to take effect from the day of the date, the day on which it is executed, is excluded in the computation. But if by its terms, it is to take effect from the date, then that day is included in the computation. Mars 678. 9. low 714. This rule of distinction is applicable to most contracts.

Insurance vs Fire

By this contract in consideration of a premium received by him, the Insurer undertakes to indemnify the insured vs loss or damage in his goods or buildings by fire - during a limited period of time. Mars 681.

It seems, yet an insurance vs fire without interest, is clearly void at C. L. as opposed to public policy. 2 Atk 554. 3 Brown P. C. 497. Mars 684 96-99-701.

But to remove all doubts, the 14. Geo 3^d expressly forbids insurance vs fire without interest in the insured.

Those who are in the habit of insuring vs fire, usually issue private ^{noted} proposals, which are deemed part of the policy importing yet if an insurance has already been effected on the same property before, notice of that previous insurance must be given to the subsequent insurer, before he underwrites; and further notice must be given of such subsequent insurance to the prior insurer; so that each one may bear his ratable proportion of any ^{loss} which may happen. If this notice is not given, the policy is of course void. Mars 725-685-6.

The interest of the insured need not be absolute. A special interest will warrant such insurance. Thus a Trustee - Reversionary - Mortgagee - Factor - Agent, have an insurable interest. But in this species of policies, the nature of the interest must be specified. The nature of the interest must be described.

By common proposals, the insurer is not liable for any loss by fire, caused by an invasion, Foreign enemy or any military or usurped power whatever. 2 H Bl 577. N. Mars 687. 706-25.

By usurped power, is either meant an invasion from abroad, or an internal rebellion, and the power of the common mob. 2 Wils 263. Mars 687.8.

In some policies, the insurer is not liable where the loss is occasioned by civil commotion. There was formerly much controversy about the meaning of this clause. It is now defined an insurrection of the people for any general purpose, as to procure the passage or repeal of some law. As Ed George Gordons Riot - 1780. Tho not a Mob.

Indeed this always implies opposition to Government in some way as its object. Mars 688.

Where a fire caused by a tortious act, the insurers, if they pay the loss, may sustain an action vs the wrongdoer in the name of the insured to obtain indemnity. Mars 603. This contract generally ~~at~~ commences at the time, the policy is signed if no other time is fixed, wh is not usual.

This policy is not assignable - it being a mere chose in action. Besides a transfer of the policy wd be ineffectual without a transfer of interest in the insured.

And the Pltff in order to recover on the policy, must have had an interest, both at the time of insuring and at the time of loss - unless there is an agreement in the policy that it may be transferred.

Much less then does the interest pass, when the subject is not assigned. 3 Bro P.C. 499. 2 Alk 554. Mars 684.5 96.7. 702. The policy is one, then, not incident to the subject but

This contract, tho so called is not strictly insurance vs fire - but only an indemnity of the person from damage

by fire. In the printed proposals it declared, yt on the death of the party insured, his interest shall devolve upon his representatives, who take the property, or subject insured. Mars 696.

In the proposals, notice is given, that the policy shall be of no force, if assigned, unless the assignment is allowed insurer no by the insurers, and unless it is entered in the books of the insurer one man to another one may be put the other can be

2 Alk 554. 3 B.P.C 497. Mars 697-99.

If the owner of the property insured, transfers it to another, and agrees to have the policy duly assigned over to the purchaser, he is liable, if he neglects to do it, to the same extent, that the insurers, wd have been, if it had been legally assigned. 1. Esp B 74- Mars 703-207.

To prevent fraud in the proof of loss, the printed insurance offices prescribe certain conditions, with wh the insured must comply, or the insurer is not liable. 6. Pl B 710- H B 574- Mars 704-7-

Finis of Insurance

Arbitrament and Award-

Extent 339- How construed 337-
 May be revoked 340. Who may be
 Party 342- Who are bound 344-
 Subject Matter 345- Who may be
 an Arbitrator 348. Umpire 349-
 1st Requisite - It must be consistent
 with Arbitration authority 345 355.
 Award must be reasonable 362.
 Must be advantageous 363- Award
 must be certain 364- Award
 must be final 366- Award
 must be Mutual 367. How Award
 construed 370. Award may be good
 in part and void in part 374
 Form of award 375- Performance-
 what it shall be 375. Remedy to
 compel performance 377. Relief of
 Awards 386. How far may an award
 be pleaded in bar to an action
 on the original claim 393-

Arbitrament and Award.

334

2 or more

That act by wh parties refer any matter in dispute between them to the decision of 3^d person, is called a submission.

The person to whom the reference is made, an Arbitrator.

When the reference is made to more than one, with provision made, that if they disagree, another shall decide, That other is called an umpire. The judgment pronounced by one

2. arbitrator, is called an award, That by one umpire, an umpirage, or less properly an award. Hyd on awards. 6.

1.

A submission to arbitramt, may be by the act of the parties alone, or their act sanctioned by a rule of Ct; and when made by act of the parties merely, it generally may be either in writing or parol agreement, yet there are some cases, where it must be made by deed. Hyd 1. 10. Id Ro 123. 961. Falk 76. 6. Mod 35. Post 11. vide.

The act of submission implies of course a promise or agreement to abide by the award, and an action will lie on the express or implied agreement, for non performance of the award, or as the case may be for a breach of the contract of submission, where there is no award. Hyd 10. 276.

The submission when in writing is usually effected by mutual bonds between the parties, conditioned to abide the award made. A bond however, is not the only mode, by wh a submission may be effected.

A bond of submission may also be made to 3^d persons, or to the arbitrators themselves, and will be binding on the obligors. So also the bond may be given by 3^d persons to abide the award as well as, them. Cro Ch 433. Cro 100. 2 Mod 73.

Cumturbach 100

It frequently happens in articles of copartnership and it is not uncommon in other agreements to insert a covenant, yt

all disputes arising between the parties and relating to the agreement shall be submitted to arbitration.

But an such a stipulation shall be a bar to a suit at Law, without a prior submission has been or attempted to be had by the Pltff at Law, does not appear to be fully settled, Parsonskt 10.

According to some opinions, the parties can't resort to an action at Law; for such stipulation will be an effectual bar,

By others, it is said, an agreement can have no effect in the action, and the only consequence of bringing the action, will be, that of subjecting the Pltff to an action of Covenant broken, 1. Lyd 127. 1. Nils 129. Ark 569. 3. Bro Cl. 336. 4. T. Arb. Ch 311. 8 TR 139. and Besey In 12. 1. Leon 39. 2 H Bl. 606.

I G. I conceive that such a stipulation cannot be a bar to an action at Law. It is a general, and I may say, an elementary principle in Law, that no one can by a former agreement, preclude himself from resorting to the established tribunals of his Country, tho' he may by his agreement, preclude himself from recurring to foreign tribunals, for that is not forbid by the policy of the Law. 2 H Bl. 606. 1. Mod 254. Id Ray. 690. 3. Palk 298.

A rule of Ct was granted in Charles II, for the 1st time, sanctioned by Stat 9. 10. of William of Orange. Originally submission to arbitramt ^{tho} be act of the parties alone, 12. formerly there was no such thing as sanctioning submission by rule of Ct. In the times of Charles II, a submission was sometimes by agreement of the parties, made a rule of Ct, and in such cases, the nonperformance of the award was punished as a contempt of Ct, that being the coercive means of compelling its performance. Lyd 21. 7 TR. 1. 7 TR. 1. 1. Anstruther 272.

There is also a similar Statute in Conn and the provisions are made the same.

A verbal submission cannot be made a rule of Ct by the Eng Stat, or Conn one. The construction given to the Stat is, that it must be written. The terms of the Stat, on the agreement to make it a rule of Ct, shall be inserted ⁱⁿ in the submission. The word "inserted", implies, yet the agreement is in writing. 7 TR. 1. Lyd 23.

339

This agreamt to make the ^{submission} a rule of Ct, is binding, and the Ct named in the submission will compel the party to have a rule entered. So the Ct will not only compel the performance of the award, but will also compel the party to make it a rule of Ct, and y^es, y^t one party shall not retract without consent of the other. 1. For 12. 2. Fee 1178. Pakk 72. Rep of Conn. 3. East 603. 8 Pk. 520.

Where a submission is thus made, a rule of Ct, the witness must be sworn in Ct, or by the Judge of the Ct, before they testify before the arbitrators. For arbitrators as such, have no power to administer on oath. In Conn. however, the oath may be administered by any magistrate. Hyd 26.

I do not know, where the submission is by the act of the parties alone, an, the witnesses in Eng are sworn at all. I find no authority on the subject, but suppose, they must be. In Conn. on such cases, it has been the immemorial usage so far as usage can be immemorial, with us, to call in a magistrate, and have them sworn.

Extent of. The submission may be of one particular matter only, or of several, or of all subjects of controversy, whatever subsisting between the parties at the time of making the submission. Hyd 26.

1

And it is deemed necessary in a submission to limit some time within wh the award shall be made, so that it may not be in the power of either of the parties or the arbitrators by leaving the time indefinite, to delay granting the award an unreasonable time. 1. Hyd 26.

How Construed. A submission being a voluntary agreamt of the parties, must be construed reasonably i^e. literally and according to the meaning of the parties. A slight inaccuracy wh wd be fatal in a plea, will not be regarded in a submission.

340.
1. Saunders
208. 265.

1. Found 205. or 65. Bro Ch 277. 400. Yels 206. 6. 1. Wils 27. 8
as when by the terms of the agreamt, it was stipulated, yt
each person bound himself, yt each party shd perform
the award. Now it was holden to be absurd, and contrary
to the intention of the parties, that they shd be bound for
each others performance. Now it was construed to mean
that each was bound to the other, to perform his own party
merely—

not

Again slight repugnancy will vitiate the agreamt,
as where submission was made on the 16.th of march, and
the conditions of the bond was to stand to the award,
if it be made on or before the last day of the instant month
of April. Now there was no month to answer the description
of this "instant month" and the condition was construed
to mean this instant month of March. Popph 16.
May be Revoked.

A submission by the "Nihil dest." The authority, given by
a submission by the mere act of the mere act of the parties
witht the intervention of the Ct is like all other acts
of mere authority, revocable. It follows, yt either party may
revoke the submission, and if either party do revoke before
the award is made, the arbitrators cannot afterwards
grant an award. 8. Coke 82. a. 2 Feble 64. 79. Ly 24

An act not

amounting to But if 2 make a submission on one side, as one party,
revocation, by one alone cannot revoke the authority of the arbitrators,
be a breach of For the authority being conferred jointly, must be revoked
the submission jointly. 12. equal solemnity. 2 Feb 64. 79. 8. C. 806.

As if A is to

so act before Where a submission is made by parol, the revocation may
any award can be also verbal. But where made by deed, it can
be made, and be revoked by deed alone. for it is a maxim. that
will not every power. authority, or obligation must be discharged
with the same solemnity, with wh it was constituted—

But this holds only of express revocations and not such as are only implied in Law from some collateral act of the parties. Thus if a Femme Cole submits by Deed to arbitration and before the award is made, or the time for making it, expired; by her marriage the submission is ipso facto revoked. 3 Feb 9. Tryd 30.1.

In a revocation, the party revoking is regularly liable on his contract to abide the award, and this liability issues, when the submission is by deed, or by parol, provide the controversy is of such a nature, y^t it may be verbally submitted, and the party may be subjected in damages for his breach of contract, unless there be a sum stipulated as forfeiture. 8. Co 82. A. 1. Lid 281. 2 Febl 10. 20. 24.

It was indeed formerly held, y^t in cases of a parol submission, a revocation did not subject the party revoking, to any damages. But this doctrine is overruled. Tryd 31. 2 Febl 10. 20. 4. 1. Lid 281.

Still if no time is appointed for making an award, and upon a request by a party, the arbitrators neglect or refuse to award within a reasonable time, he may revoke their authority without a breach of the submission.

And it will be for a Jury to decide, an a reasonable time was allowed or not. 2 Feb 10. 20. Tryd 33.

And in the case of a Femme Cole, who marries before an award is made, tho' she is liable for damages for breach of Contract, but if the husband and wife submit again, the Ct will not encourage the opposite party in suing for the forfeiture. 3 Feb 9. Tryd 33.

It has been a matter of doubt, an a party can revoke a submission, wh has been made a rule of Ct, 12, an his revocation will preclude the arbitrators from making

a valid award - It has been shewn y^t the Ct will punish him for contempt.

Indeed if one of the parties by any act prevents the arbitrators from making an award, he is guilty of a Contempt of Ct. as where the time limited by the Ct for making the award was 48. hours, and one of the parties procured the imprisonment of one of the arbitrators, so that they cd not proceed. He was punished for a contempt. Fath 73. 7. East 608.

Who may be Party

Any person capable of making a valid contract, may be a party to a submission, or in other words, any person capable of making any other contract, may make this contract.

Hyd 35.

But on the other hand, any one, who is under any natural or legal incapacity to make other contracts, is equally incapable to make a submission to arbitramt. Hence a Feme Covert, Infant, Idiot, or Lunatick, cannot make such submission to arbitramt. 1. Roll Arb 2 a. 1. a

There has been an opinion advanced, that an infant may submit to arbt a tort committed by himself, on the ground he wd be liable for a tort in a suit at Law - Hyd 35. 6. But I G. thinks this rule incorrect, for tho' he may be liable for a tort at Law, yet he is not supposed to have y^t discretion wh is necessary. 1. id. . 77

A husband alone may submit all controversies for himself and wife relating to such right of hers, as he can control, but no other - Fel 35. Hyd 35. Style 35. 1. Roll arbitramt §. 4. Hyd 145. 6.

If an adult enter into a bond y^t an infant shall perform an award, he is bound by his bond, tho' the infant can't be compell^d to perform the award - Fath 207. Hyd 36. 9. 3. Leavins 17. Cumb 318. Hyd 36 to 39. Jenkins 116.

It was formerly held otherwise, and that an adult wd not be bound by his bond. Equity Cases, 49. 1. Rd 267, Denk 116. It is now clear, yt any person may bind himself, yt another shall perform a duty, tho it be not in his power, to save the penalty by obliging the other to perform the condition.

An Exor or Adm^r may submit in his representative capacity all controversies between him and others, and the award will bind him personally: but those entitled to the Assets are not of course bound by the award, For if they can show yt the Ex^r has recovered less or been obliged to pay more, the Ex^r will have to suffer the loss, and he must account to them, precisely as if there had been no award. Com Dig. Adm. Pl. off, Exor 71. 159. 229. Dyer 216. 17.

Dyer 216. B. 17. & Ryd 39-40- 2 Count Ro- Arbit.

This may seem a hard rule on the part of the Ex^r, but it is necessary for the protection of the other party, For the Ex^r submits a right in wh he has no beneficial interest, and he can't be prevented by those entitled to the assets.

Now in case of a Judgment oⁿ a Ct of Law, the Ex^r runs no hazard, for whatever the Ct decides, he shall receive as pay is conclusive vs all persons.

If an Ex^r or Adm^r binds himself by a submission: an award that he shall pay a certain sum to the other party is conclusive, that he has assets in his hands to that amount, as the property of the testator or intestate: and to an action bro^t on the award, he will be estopped from pleading that he has fully administered 5 TR 8. 7. Do 462, 53. Toller 465. Ryd 40.

It was formerly held that by the mere act of submission to an arbitramt, he acknowledged, he had assets in his hand to the amount of his claim - But this doctrine is now overruled, 1. TR 691. 5. Do 6. Toller 465. Ryd 40.

Who are bound?

In general only those who are parties to the submission are bound by the award. Hence if one of two or more partners in trade, submits to arbitramt, all difference between the firm and another, the partner submitting shall be bound by the award, but the others shall not, because they are strangers to the submission 2 Mod 228. Hyd 42.

But if a man authorizes another to submit any difference between himself and another, the Principal will be bound by the award, and the Agent will not. Dyer 216. 17.

Hyd 42. Dyer 216 B. 17. A

In general one is bound by an award, to who he has submitted for another and in his own name. A submits in behalf of B, and binds himself; yt he will perform any award, yt may be granted vs B. Now this is a valida Contract. for any person may undoubtedly obligate himself to do another's duty, 2 Feb 20. 718.

If several persons are parties to a submission on one side, and all of them agree to make the submission, and one of them alone executes the bond, to abide the award, the submission is binding on all. I trust however, but that one alone is suable on the bond. 1. Roll Arb 11. Hyd 42. 4. Cro Ch 434.

And if A and B give each their several bonds to perform, they wd be jointly liable on submission, but only severally liable on their bonds. Infra. auth.

If there be an award vs 2 or more, that they perform one entire thing or duty, both are bound for the performance of the whole and if any part is not, done, both are liable.

But if the award had been several, the rule wd be reversed. Hyd 43. 4. 1. Roll arb 10. 11. E 9.

If an attorney submits a cause or controversy for his client, without his authority, the Attorney is personally bound by his submission & the principal is not.

So a fortiori, if a Stranger submits for another, without his authority, he is bound and the principal is not.
 La Ray. 346 12. Mod 129. Comb 239. Patk 70.

In Penn, it has been held, that the assent of an Attorney in a particular cause to a reference by a rule of Ct 1. Jul 144 Ct, will bind his clients.

If a husband submits a controversy relating to any right of his wife and which he has the right to dispose of, the award will bind the wife after his death. It wd be more proper to say that y properly affected by y submission, will be bound to the award after his death. 1. Roll Ab. 1.

And if a husband submits all matters of controversy between him and another, this submissionⁿ comprehends all matters in dispute in right of his wife, proviso they are such as he has a right to control.

Therefore a claim due to or from y wife in y character of Exx of another, will be included in such a general submission, because her trust as Exx, while sole, has by marriage, devolved upon y husband. 1. Roll J. 2 § 3. Cro J. 447. Ty d 46.

But, ⁴⁰rule does not extend to rights, wh as husband, he has no power to control. Therefore if a husband shd make a genl submission of all controversies between him and another, such submission wd not include any dispute relating to his wife's title to an inheritance. 1. Roll arb L. 4. Ty d 47. 145.

And an award ^{vs} a party binds heirs executors & Ad-mors after his death. 2 Vent 249. La Ray 248. Contrary, Cro E 600. not Law. Some controversies can't be submitted to arbitramt

Subject

A demand for a sum certain can't be a subject-matter of arbitmt, therefore a debt on a bond for a sum certain can't be submitted, quia the sum being already liquidated

there is nothing about wh to arbitrate. 1. Roll arb. R 136
1. Levens 295. 2. Feb 693. Kyd 51. 3.

I G. But y^e rule means nothing more, than y^t a Question how far a valid Bond binds the obligor, shall not be submitted to Arbitmt, but if there be any dispute about the legality of the bond, or any discharge by payment, may, "imea mente" be a subject of arbitmt.

Upon y^e same principle, it is said, y^t debt for arrears of Rent ascertained by deed, can't be submitted to Arbitmt. and when any sum of money is liquidated as by judmt, of a prior award or decree, it can't be submitted, quia tis a liquidated debt. Ibid. and as general rule when uncertain damages only can be recovered by an action, the demand may be submitted to Arbitmt. 242.

Hence debt on simple contract is a proper subject of arbitmt, quia the debt is not liquidated. So also rent for use and occupation, or rent where the precise sum is not ascertained. by deed, may be submitted, and so of o^r sorts in general. Kyd 52. 3. 1. Roll R 8. 1. Roll arb. v. 6.

And a demand tho created by deed, may be submitted when the demand is not wholly ascertained. by the Deed. Thus a contract to repair buildings or fences, may be submitted to arbitmt, and in fine a contract to do any thing except to pay a liquidated sum of money, is a proper subject of arbitmt. Cro. F. 99. 6. Coke 43. 41. Roll arb. F. 1. to 6.

and as a general rule, claims wh can't be submitted alone, may still be submitted in connexion with others wh are uncertain, quia there is an uncertainty so far as regards the whole, as a bond for \$50. and a claim for Trespass. 2. Feb 623. 59. 1. Dig. Rolls arbitrant R 3.

But when a demand arising by deed, is submitted, y

347/100

submission must also be by deed. quia a speciality can't be answered but by speciality. 1. Roll arb. B. 8. Hy d 34. 54.

It was formerly much doubted an any dispute concerning y tittle to lands cd be submitted to Arbitramt. It was sometimes held yt such submission was totally void, by other opinions to abide the award, was binding, by others it was also void, and there were other opinions qualifying both of these. 1. Roll arb 14. 15. 1. 2d Ray 115. Hy d 53. 62. 6 Mod 231. Cro. E. 233.

But tis tis now well settled, yt the tittle can't be transferred by an award, 12. tho' an award can't vest the tittle by acting "in rem" as a Ct of Chan. can. Yet an award ordering a transfer of lands, is good, and may be enforced in Cts of Justice. It follows yt an ~~award~~ bond to abide an award is binding, tho' it be concerning the tittle to lands.

So also an award of partition is good, and may be enforced in the Cts of Justice, 6 Mod 231. 3 East 15. 1. 2d Ray 115. and it has been lately holden in the Kings bench, yt an award concerning tittle to lands, is conclusive of the right to the lands, as in ejectmt between the parties, tho' it does not "per se" transfer the tittle 3 East 15. 1. Ph 75. 4 Falk. 120.

Hy d 63. 4.

But as lands cannot now under the Stat. of Frauds, be conveyed except by Deed, it follows yt both a submission and award must be by Deed. Hy d 62.

I have observed yt torts in general might be submitted to Arbitramt. but to this rule, there is no exception, when the Civil injury is merged in the Public offence, there can't be a submission of y Civil injury, but rule holds of suits also in Cts of Law.

So also where the tort includes an offence vs the publick, Hence an action for Crim Con. can't be submitted to Arbitramt. So also seduction of a daughter

laid with "per quod". These rules are founded on principles of morality: and it is thought unfit to submit these subjects to private tribunals. 1. Ryd 53. 8, 63. 8 Pls 520

And it also seems, y^t no indistinct, or other criminal prosecution can be submitted to Arbitramt, for the publick and public justice are concerned in such case, y^t the offenders be punished. 8 TR 152. 520. Ibid 65-6-

Nor can a question of Legitimacy be submitted by the Civil Law, and as our own law of awards is derived from the Civil Law, tis "prima facie" so by our Law. Ryd 68-9-

Who may be an Arbitrator?

In general all persons of sane minds, and who are "sui juris" i.e. under no legal incapacity, may be arbitrators. Com D Arb 5.

On the other hand, persons of "non sane minds" not "sui juris" can't be arbitrators. Hence an Idiot, Lunatic, or madman, is incapable for want of understanding. So an Infant, Femme Covert, quia. they are not "sui juris." Com D. Arb. C. Ryd 70-1

A person attainted of felony or treason is also disqualified, for he is not a "Legalis Homo" not having civil power, nor civil rights, and the Law won't let him judge of others rights. Ibid.

But a Femme Sole of full age may be an arbitratress, tho' she can't be a Juror, for the law selects jurors. Ryd 71. But if the parties wish to refer their differences to a woman, the law will not interfere to prevent it. Ryd 71. It wd seem from Eng Auth, that a man may be arbitrator in his own cause, with his adversary's, consent, Cambl 218. 4 Mod 226. quia it is said, the party having consented to it in his submission, has waived

342

all right of objecting to the award. This rule is contrary (Says 89) to all the principles of obvious expediency. It farther the civil law from wh our law of awards is derived, expressly forbids yt a man shall be arbitrator in his own cause

Mere partnership between arbitrator and one of the parties, does not preclude him from acting as such: for by consenting to his nomination, the adverse party has shown his opinion, that such a relationship will not effect the justice of his decisions Tryd 75.

Umpire

An umpire is a person appointed to decide the controversy in the event of a disagreement between the arbitrators.

He may be appointed previously by the parties, or the arbitrators may have the power to appoint one in the event of a final disagreement between themselves. Arbitrators as such, have no power to appoint an umpire: but y^s authority may be given by the submission. 1 Roll. arb. Tryd 75. 7. 1. Roll arb P. 1.

The decree of the original arbitrators, is called an "award". yt of the Umpire, an umpirage. An Umpire can't make an umpirage, 'till there has been a final disagreement between the arbitrators, for he is emplaced or empowered in such an event - & it was formerly held, yt his power did not begin, 'till that of the arbitrators had terminated. This last proposition has been qualified. 1. Roll arb. P. 6. 2. Vern 100. Ray 167. 2. Feb 462. 619. 2. Saund 132. 1. Salk 71.

It has since been determined, that an umpirage may be good, tho' made within the time to wh y arbitrators are limited, proviso before this time expires, they do not make an award - but if they actually award, then the umpirage is of no effect. 2. Feb 262. 3. 362. 2. Saund 129. 1. Lev 174. 285. 7. 80. to 88. 2. TR 645. 5.

When the arbitrators are empowered to appoint an umpire, if they appoint one and he refuse to accept, they may appoint another, and proceed in making successive appointments, 'till one accepts. 3 Lev 263. 2 Vent 131. 3 Feb 387.

Hyd 88-

In the investigation of controversies submitted to them the arbitrators may examine the parties themselves, at least there is nothing in the C.L. to prevent it, but the parties can't as a matter of right, testify in the case unless it is so provided by the terms of the submission *Hyd* 95.6.

In *P.A.* the parties have a right to relate their own stories, and the witnesses may be heard witht oath, unless there is a condition in the submission wh forbids it. 1. Gall. 161.
On this point, there is no rule established at C.Law.

As a general rule, the arbitrators have power to adjourn from time to time, for it often happens, yt an award cant be made in one day. Still they cant adjourn to any effect, to a day beyond the time limited for awarding - But if there is no time limited in wh to make the award, they may take what time, they please, that is they may adjourn from time to time indefinitely. *Hyd* 96

When a period, is fixed within wh the award shall be made, it must be made within yt period, or it is void "in toto" But where the submission is by act of the parties only, witht the intervention of a Ct, the parties may extend the time to a more distant period.

On the other hand, where the submission is made a rule of Ct, it can only be enlarged by motion to the Ct, to grant a farther extension. *Ibid*

The duties and powers of an umpire are the same as those of an original arbitrator, and he must see and examine for

for himself and can't make his umpirage from the information or statement of the arbitrators, 1. Roll arb. P. 7. 4 Tth 589. 2 Ball 276. 4 Ball 232.

and the umpire must decide the whole controversy, if any, for if the arbitrators decide a part, and refer the rest to an Umpire, and he decides only the residue, it is void, Now it often happens, there a number of controversies submitted, and it may happen y^t the arbitrators will decide a part and refer the rest to the decision of an Umpire, if so the whole proceedings are void, quia they have no community of authority. Ryd 102. 1. 1. Arb. Roll Roll arb. P. 8.

This last rule is questioned by, Mr Tyde but there seems to be no ground for it. Such cases, however, may be made legal and valid, if the terms of the submission authorize it. But as I conceive, not otherwise Tth 589. 1. Roll Arb. P. 8. For there is no joint and common authority between the arbitrators and the Umpire. Ryd 103.

and hence when the submission was to 4 persons named, and to the umpirage of a 5th, and the award was found by the whole 5. it was held at first to be valid, but has since been denied by La Mansfield. Held Good 1. Butot 134. Denied by La Mansfield 1. Bl Repth 463 Tyd 105.

Where a submission is to 2 or more arbitrators, they must all concur in y award, or it will be void, unless it is provided for in the submission itself. For where a private authority is conferred on 2 or more, it must be executed jointly, unless stipulated in the submission, y^t the award of any part of them shall be valid.

As if the submission be to 3 or 3 arbitrators or any 2 of them, with authority to any 2 of them to make a valid award. - Still it is not competent for any 2 of them to meet and make an award, witht giving notice to the

Tyd 106.7. other of the meeting, for if they do, their award will be void,
 Barnes 57. 1. Dall 364. The award is complete, when ready
 to be awarded, if so ready within the time appointed. It
 follows, y^t if any accident ~~not~~ sh^d present its being delivered
 within the time appointed, the award wd still be good &
 may be delivered subsequently. 4 East 584. 6 East 309.

And alterations in the award, after it is ready to be delivered
 and notice has been given of that readiness, is void, so
 as regards the alteration, and the award will ~~not~~ stand
 as it was before the alteration. For from the time, y^t
 an award is ready for delivery, the ~~alterations~~ ^{arbitrators} are consid^{ed}
 as having ~~complet~~ completed the trust and their authority
 is ended. 6. TR 309. Tyd 119. n.

When several distinct controversies are submitted, the award
 must be made at the same time upon all of them.
 The arbitrators can't award on one controversy, to
 day- and q^{uo} ad another, to morrow. For they become
 by the submission consolidated into one entire question,
 and the award when given must be upon all.
 This rule don't prevent the arbitrators from settling
 their opinion upon one dispute to day, and another,
 tomorrow, but they shall not make distinct, and
 sepe^{rate} awards. 1. Roll arb 7. TR 1.2. 82. Tyd 120.1.

The Rule is the same, if they reserve to themselves any power
 to explain any doubts arising from the construction of an
 award, it is void. Tyd 123.1. Palm 126. 110. 46.
 Of course if they ~~rese~~ reserve any power to alter the award
 the reservation is void. Tyd 123. Palm 126. 110.

But an award in the alternative may be good, as an
 award y^t one party shall pay the other. ~~£100~~ on a certain
 day, and if not pd on y^t day, y^t he shall pay 1000.
 This award is good, for there is no reservation of future

authority, but merely a penalty to enforce payment at the day. 1. Roll Arb H 8. Ryd 123.

It is said, y^t the reservations o^t to an arbitrator, or a stranger of ministerial authority ^{is given} is good, for the person, to whom the authority ^{is given} is rather an instrument to carry the award into effect, than any thing else, and there is no judgment or judicial power exercised in the case. Hardwick 43

It seems, then, y^t an award, y^t D shall pay C. such a price for certain property, as D. shall appraise it at, is void. For the appraisal is a matter of judgment, and discretion delegated to D. Ryd 126. 2 Roll R 189, 284 214.

Again an arbitrator can't delegate his authority, to another, and an act purporting to delegate it, is totally void, for the authority so conferred, is not transferable, — Or if the award be, y^t the parties shall abide the award of other persons, hereafter to be made, Now this is very different from appointing an umpire in performance of the submission. 1. Roll R arbit D. 20. H. 11. P. 9. Cro Eas 432. 560. Salk 71. Jenkins 129. Ryd 127. 157.

But an award deciding in substance, what is to be done, and leaving only the form to be settled, or the amount to be computed by another, is binding on the parties. as if the award be, y^t one party shall pay a sum certain to the other, and at a certain time with interest to be computed by a 3^d person. Now the award is not for its cause void, for here is no delegation of judicial power whatever, Cro East 726. Ryd 127. 2 att 501. 4 Salk 71.

Roll Arb. H. 5. 7. Jenkins 128.

Upon a similar principle, where the submission is of an action at "Nisi Prius" under a rule of Ct the arbitrators may direct the costs to be computed

or fixed by the proper officer of y Ct, and the award is binding, for it is the province of y^t officer and not of the arbitrators, to tax the costs of Ct. 2 Atk 519. Salk 75. 6 Mod 175. 2 Hbl 231. 1 Sid 358.

And if an arbitrator upon the submission of a pending action, award costs of suit generally, without either settling the amount himself, or naming any person to tax them, they are to be taxed by the proper officer of the Ct, where the action was pending, when reference. Both of these rules suppose a reference to have been made of an action in a Ct, for costs of reference cannot be so taxed. Strang 737. Com R 330. 1 Sid 358. Tyd 135. 6 Mod 195. 2 Hbl 31. Barnes Note 58.

In these cases, when costs are to be taxed by the officer of Ct, he taxes only the suit, by wh are meant the costs wh have accrued in Ct, & he can't as officer of the Ct, tax the costs of reference. Sid 135. Barnes 158.

And a reference of a taxation of the costs to any other person yⁿ the proper officer of the Ct is void, for he wd have exercise judgment, not being supposed to know what the costs are. Str 11. 25 or 1025.

The authority of the arbitrators can't be delegated, yet an award that the parties shall abide by a former award made upon the same controversy and between the same parties is valid; for this is a new award in the form of an old one. 1 Roll arb H. 12. Kyd 137.

An award to be made "on a day" must be made on y^t day.

An award may be made at any time within the period limited for awarding, and so far as time is concerned, it will be valid. Lach 14. Cro E. 676. 3 Bro Chy 348. Tyd 1378.

As a general rule an award is

is subject to no appeal or revision, it is ^{like} a final judgment obtained in a Ct from wh there is no appeal. But still this rule is to be taken with very particular restrictions, arising from the nature of the arbitrators authority, and tho writ of Error can't be from an award, yet as an award only ascertains the rights of individuals, and can't execute itself, still a Ct of justice when applied to to enforce it, will not if it be invalid, and in some cases a Ct will not only refuse to enforce it, but will also sit it aside. *Syd* 139.40.

- II requisite. it must be consistent with arbitrators authority - Even the most general submissions comprehend only such controversies as existed at the time of making the submission: and not any wh may arise subsequent to the submission, and prior to the award. Of course under a general submission, the award must comprehend only such matters as were in dispute when the submission was made. 2 Mod. 309. *Syd* 140.41.

Again a submission of all actions between the parties extends only to suits already instituted, and does not include mere causes of action - but the word "Complaint" or comprehends all causes of action *Syd* 141.2. "controversies"

An award of money in satisfaction of any particular personal injury is good. for money is the proper measure of damages. But an award of any specific property - not connected with the subject matter in dispute - is void, As an award that a trespasser shd transfer any specific property wh is not connected with y subject in sub dispute, in lieu of damages, it wd be void. 1. Roll arb B 11. 6 Mod 221. *Salk* 76. *Ed Ray* 1039. *Syd* 143. 45.

Under a submission of all "demands". y arbitrators

may decide all controversies as well real as personal,
For the word 'demands' extends to all claims whatever,
Edw. 113. 15. Tid 145.

If 2 partners submit all ~~the~~ differences between themselves
the arbitrators may award a dissolution of the partnership,
So also in a submission of all between master and servant, the
arbitrators may order the servants indentures to be given up.
Cro. P. 577. s. 2. Feb 833. 10. Mod 201. 1. Roll 254

It has been held, yt an arbitrator has no power to award
any costs of reference, unless authorized so to do, by the terms
of the submission, as is a claim arisen since the submission
was made. Cro. P. 577. s. 2. Feb 832. 10. Mod 201. 1. Roll 254
832 201.

I G. thinks
y power of taking
costs of reference
is implied in
y authority of y
arbitrators.

This question has been much agitated of late, but as y
power of taking decisions have most generally gone to some other point,
costs of reference point, it does ^{not} now appear, to be well settled in England.
at any rate y rule does not seem to be altogether satisfactory
to the Cts of Westminster, 2 T. R. 645. 1. B. and P. 34
Tid 151. 3. 394 to 98.

In conn, the rule has been universally a departure from
y Eng one, and the arbitrators have always taxed y
costs of reference, if there is no provision in y commission
wh rule has been sanctioned in the Ct of errors. 2 Comt R.
2 Comt R.

Where a pending action is submitted with a provision
yt y costs shall abide the event of y award, costs can
only be awarded as they wd have been by a judgment
of Ct, had the suit been continued in Ct. Therefore
where by y Stat for the prevention of the insidious
frivolous disputes, it is provided yt no more costs
yn damages shall be awarded, The costs under a ref-
erence cannot exceed the amount of damages.

3. T. R. 139. Tid 150. 3. 4.

But no Ct
can do it.

It is in the power of the arbitrators to order mutual releases to be given by y parties each to the other, and yd was formerly univ^{er}sally, & now frequently done, for y end of the submission is, to end the controversy or controversies.

But an award of releases to be dated after y submission, so as to effect any subseqt claims is clearly made ^{void} so far as regards such subseqt claims. Indeed by some opinions, the award is void in toto. but I can conceive no satisfactory reason of this extension of y rule. *Hyd* 153. 155. C. 243. 256.

It is a general rule, yt an award can't extend to any one who is a stranger to the submission, & if it does, it is thus far void, for 3^d persons ought not to be effected by a submission, to w^h they are strangers either to be benefitted or injured by the award. As an award yt one party shall convey certain bonds, to y other party, & his wife and son. This award is void as to the wife and son, they being strangers to the submission. 5 Co 77. B. 78. A. 10. Co. 131. a. 138. a. 3 Leon 62. *Hyd* 156. 7.

1 Roll arb B. 5-7.

So on the other hand, if the award be, yt one of the parties and a 3^d person, shall do a certain act, it is void, so far as regards y 3^d person in general, as if the award, yt one of the parties & his wife or his heir app^{ar}ent, shall by his procuremt make such a ^{such a} transfer of the lands as the other shall require, Now this void, quia they are strangers to y submission.

1. Roll Arb n. 9. *Hyd* 156.

So upon the same principle, an award, yt one party shall pay a sum of money to I. P. a stranger, is void. 10. Co. 131. B. 1. Roll arb C. B. & 5. The reason on w^h y rule is founded, is, yt the authority of y arbitrators, is

yt the authority of the arbitrators is merely to ascertain and settle y rights of the parties.

Still this is a general rule holds true however only where such payment to a 3^d person wd not benefit the other party and therefore an award yt one party shall pay so much to the creditors of the other party in discharge of a debt due by that party to the 3^d person, is good, and can be enforced, For it is only one way of ^{avoiding} satisfaction to y party aggrieved. 1d Ray 123 Roll arb E. 5. This is what a Ct of law can never do, unless the party to be pa, is made a party to the submission or Suit. Ryd 158-

Again an award yt one party shall save harmless, the other from all claims arising from a bond executed by both to a 3^d person is valid. Now ys wd seem to be the only proper award, where a surety has joined in a Bond wtht having taken any counter security of his principal. Cro E. 596. 2 Mca 9. 2. 1. Feb 546. 1. Falk 74
1. Roll arb E. 11. 541. 1. 2. Ryd 159-

A great difference But with regard to 3^d persons, who are comprehended between an act in the award, if they are contemplated in the submission to be done by in the submission, tho' not made parties to it, the award is an act to be may be good. As an award yt all suits between the done to a stranger parties shall cease, or any other in their behalf, This the first void is good, quia all suits in their behalf, are contemplated 2^d - good - in the submission. 1. Roll Arb B 18. 1. Ryd 790. 865. Bonnard 1. Gould - 85. Ryd 160. Ryd 159-
So Paye-

and where an award directs y interposition of strangers to carry it into effect, as a ministerial agent, the award is so far good. Thus if the award be, yt A shall ^{execute} a deed of feofmt, to B, with letters of Atty to D. to make livery of Seisin - 1. Feb 159 1. Roll arb E. 7. 8.

307
But an award can't extend beyond the time of submission, as where the arbitrators award a mutual release, to take effect from the time of the award made, wh was held q void, quia it comprehends all matters yt had arisen between the time of making y submission & granting the award. 11. Co 131. 2 Jonk 264 1 Roll arb B. 4. 6 Mod. 232. Kyd 170 - or 117 -

But where the submission is of one particular suit or controversy and the arbitrators award a general release of all claims, ys is good, unless the party objecting can prove, yt other disputes existed at y time yt y award was made. 2 Sid 309. 1 Sid 154. Kyd 170 - 1 Roll arb 22. B.

The award must comprehend all the matters submitted and not any particular part of them. Cro E. 858

But even tho y award is not as comprehensive in its terms, as the submission, yet it will be good, unless it is shewn yt other controversies actually existing were submitted. 1 E. laia before them. But if this be shewn then the award is void in toto. as if the submission be of all actions, both real and personal, and the award is of personal actions only. it will still be good, unless the party objecting can show yt actions relating to realty were submitted. Cro E. 100. 355 8. Co 98. 1 Bur 2874 274.

In these cases, the presumption is always in favour of the award, i.e. that 'no other controversies existed save those that are submitted and decided, and the Thus lies upon the party objecting

There has much controversy and a great deal of learning expended with regard to the controlling effect of the clause, "ita quod, when inserted in a submission.

The clause run thus. So yt the award may be

made of and upon the premises on or before such a day,
 The distinction found in the books is this. Where the
 submission is of specific matter and the clause "ita quod,"
 is inserted in the submission, then the award must
 on the face of it extend to every specific dispute, in
 the submission, or it is not binding. This is rather a
 technical distinction, and the meaning of it, is yt the
award is not binding upon the parties; unless it
 embraces all the premises. 1 E. all the disputes named.
 Leave out the "Ita quod" and the rule will be secus.
 Cro E. 201. 354. Hob 47. 2 Pound 292. 2 Dec. 3. 3 Lev
 413. 2 Roll 759. Patk 75. 2 Vent 242. 3. 1 2 Bern
 100. 8 Coke 98. A. Kyd 181. 2.

On the other hand, tho' the clause of "ita quod," be inserted
 in the submission, yet if the submission be general, viz
 of all controversies, if the award embrace all matters
 yt are laid before the arbitrators, it will be good.
 5 Co 98. Hob 49. Cro E. 216. Kyd 176. 9. 1. Roll Arb B. 24-

The ground of this diversity is, yt the clause, "so that"
 requires absolutely, yt the award shd be of and on the
 premises. and shd contain all the premises and matters
 in dispute named in the submission. The words "so that"
 being regarded as a condition precedent, yt the award
 shd be made of all the premises.

When the subscription, or submission is general, of all
 matters in controversy, if one party neglects to present a
 claim to the arbitrators, so yt y award does not embrace it,
 that claim may afterwards be enforced by an action.
 4 RR 146. 7. N. Kyd 179. 80.

If there is a submission between A and B.
 on the one side, and C and D on the other of all disputes between
 them, this submission is construed to extend to any disputes,
 between any 2 of ym. Hard 399. Roll Arb & 5. 1 Bern 295.

361.

Com Re b. 3. 547. Kyd 133

Indeed a submission of all disputes between 3 persons, is construed as a submission between any 2 of them, and the submission is taken disjunctively. Com Re 547. Kyd 183.

But if it appear in the submission, yt there were differences between one party and all those on the other side, and the submission be with the clause. 'ita quod' the award must comprehend all parties, yt clause being considered as a condition precedent Roll arb 9. 8. Kyd 183.

An award vs law is void, in like manner, as a Court vs law is void, as where the award orders any thing immoral or criminal. 2 Vent. 1 Roll arb 9. Kyd 184. 5.
4 Dall. 298.

But an award giving damages or a recompence for that wh at Law is not actionable, is not void. I.e. it is no objection to an award, yt it gives damages for what in Law, don't amount to a cause of action. 2 Vent 242. 3. Polm A 165. Contra 1 Sid 12. 11 Kyd 185. 242.

Still if an arbitrator award a recovery on an illegal contract, it is void, For tho by the former rule, they may award damages for what is not actionable at Law. yet they may not award the paymt of an unlawful contract, for it wd compel the party to do an unlawful act. 4 Dall 298. 3 Caines 323.

Again an award of what is physically or morally impossible, to be performed by the party, is void, as an award yt a shall deliver a deed of wh he is not owner, and over wh he has no control. 12 Mod 188. 1 Roll arb 1. 2. 3. 4. 5. Kyd 186. 5.

This is analogous to y limits assigned to the Law itself wh can do nor command any thing impossible.

So an award yt one party shall procure such surties as the other party shall approve to be bound with him, 3 Mod 372. 372. 278-

So an award yt one party shall suffer a nonsuit in an action not then pending, is void.

But an award yt a 'Cestui Que Trust, shall procure his trustee to give a release of the Estate in trust is good, for as is not impossible for the Cestui Que Trust can compel a trustee by a bill in equity to execute such a release. Kyd 188

Arbitrators may award y discontinuance of a suit, and so of course may award a nonsuit in an action pending for neither of these are impossible. it being in y power of y party to enter a discontinuance or suffer a nonsuit 1. Roll Abr 5. 5. 6.

Kyd 189-

Awards must be reasonable.

It is essential to y validity of an award, yt it shd be reasonable and if not, it is void for that cause alone

This appears to be a very vague rule, but by reasonable is not meant yt the award must be strictly just, and if not, the Ct will not enforce it. But it means, nothing more yn yt y arbitrators shall not award yt wh cant in any case be compulsory, as an act, yt one person shall serve another from any period of time is void, it being unreasonable as contrary to y principles of Civil Society. 1. Roll Abr 12

So if the award orders an act to be done, wh wd be a tort upon a 3^d person, so as to subject y party performing to a suit from y 3^d person, was void.

It was upon ys principle, yt it was formerly held, yt an award ordering y paymt of money to be made by one party in y house of a stranger, was void, for y stranger might forbid him entering his house.

But y^e rule is now exploded for the Ct say yt if y stranger will not permit him to enter, paymt or tender at y door or as near as he may approach witht committing Trespass will amount to a performance on his part. For y old Rule vide Bult 49. 1. Feb 92. 1. Roll Arb J. 10. Tyd 189. 90. For y last rule, 3 Feb 479. 3 Les 153.

And during these times of it was always held, yt an award ordering y paymt of money, to be made at a public Inn, was valid, owing to y rightt. (I suppose) wh every one has of entering an inn. 2 Mod 304. 1 Roll Arb J. 4.

And if an award find a given amount of debt & only a part of yt sum is awarded to be pd by y debtor, witht making any satisfaction for y residue, it is void as being unreasonable. 2 Mod 304. 1 Roll Arb J. 4.

Must be advantageous An award of any thing wholly nugatory and idle, is void, precisely as a Contst of y^e kind wd be void. as if y award be yt one party shall go to France. Now y^e is void, quia it can be of no service to y other party.

Indeed the rule is laid down, yt y award must be of something yt in common presumption will be advantageous to y other party, or it will be void. 1. Roll Arb J. 11. Tyd 192. 1.

And an award yt a party shall intermarry, is void, and y reason assigned is, yt it is not advantageous. The true reason is the impolicy of compulsory marriages. 1. Roll Arb J. 10. Tyd 192.

And y old cases seem to require that the act to be done by one party, shd be in a positive sense, advantageous to y other. That in short, it shd be in y nature of a recompence to y party recovering, and any thing short of y^e is not good & valid.

On y^e principle, it was held yt an award yt each party shd go quit wth y other of y trespasses committed

on one another was void. quia y advantage of any was merely negative. There is ^{no} doubt yt such an award wd be good, at y^s day, and it is upon y^s principle yt mutual releases are so often awarded. at y^s day. 1. Roll Arb. §. 1.3.7. Hyd 193.

Awards must be certain

The rule is y Another requisite to a valid award is, yt it must be certain, some, precisely & intelligible and definite as to what it enjoins so yt there as with contracts may be no difficulty in ascertaining what is ordered to be done.

Therefore an award yt one party shall pay y other for labour done, without naming y sum, is void for reason of its uncertainty. So an award yt one party shall pay y other so much as may be found due, is void, for its uncertainty, it being y duty of y arbitrator to ascertain and settle y sum. 2 Lound 292.3. 5th pp. 8. Hyd 194. 5. Cro E. 432. Cro J. 525.

So an award yt y defendant shall deliver certain goods and 3 boxes, together with several Books, without naming y books, is liable to y same objection of uncertainty. So an award yt one party yt one party shall deliver to the other a certain writing or bill obligatory, is wholly uncertain, and as it dont state of what sum, or of what penalty or of whom it is obtained. For these and other examples of a like nature, vide last auth and La Ray. 124. 234. 1096. Str 1024. Cro J. 314. 6 Mod 244. 2 Buls 261.

Same in contrs. Where an award directs a certain act to be done, at a given time from y date and the date of y award be omitted, y time shall be computed from y delivery of y award. La Ray 1096. 6 Mod 244.

An award yt one party shall lease lands to y other or his assigns, is sufficiently certain, for it is said, it shall be understood, to himself alone now I see no reason for adding y^s second clause, for it is sufficiently certain without it., and y effect is yt y lease must be made to the party, unless prior to y execution he appoint assigns,

assigning to them y award, in wh case the case must be made to ym, 1. Feb 335. Ryd 282.1. Ryd 201.

If the award order a reassignment of lands mortgaged, it is sufficiently certain wtht naming y quantity of interest to be reassigned, as it will be understood to mean, the whole interest mortgaged. Ld Ray 214. Ryd 201.2.

Ld Ray 234—

So an award is certain if it can be made certain, by being referred to something wh is certain, as an award yt A shall convey to B, a form of land described in a certain deed, y deed being identified in y award, for it is a maxim in Law, id certum est, quod certum reddi potest.

The same rule also applies to y law of contracts, Indeed with regard to certainty, the law of awards is properly analogous to yt of contracts, is properly analogous to yt of contracts. Ld Ray 612. Cro E. 676. Ryd 202.5-6—

An award yt one party shall pay to y other the costs of a particular suit wtht specifying y precise amount, is sufficiently certain, quia it refers to the taxation of y proper officer of the Ct.

So an award yt one party shall defray the expences of a certain voyage not yet complete, is good, and in an action on y award the expences are y proper subject of an averment.

Cro 383. 2 Vent 242.

1. Feb 569. 3 Lev. 18. Ryd 205.6 Cro. Ch. 383.

An award may be ~~be~~ conditioned, wtht being liable to objection for uncertainty, as yt one party shall hold possession of certain lands for such a term of years— on condition yt he shall pay so much rent at y times appointed, and if he does not, his interest in in y land shall cease— Cro E. 422. 3 Lev 18. Ryd 203. 2 Feb 828.

And as an award may be conditional, so also it may be in y alternative, and it is not objectionable for uncertainty.

as if the party shall deliver a certain deed, or pay a certain sum of money, now y^s is sufficiently certain, ~~qu~~ quia when he has done of these 2 things ordered, he has performed y award. 12 Mod 585. 6. Ryd 204. All awards are analogous to contracts.

An award for y payment of money is not void for uncertainty immaterial ubi quia it does not name y time or place of payment, and
 1 Q. - if no time is appointed for the payment, y party it is said must have a reasonable time and a demand after a reason-
 E. immediately - able time will entitle y party to whom y money is to be paid
 1 Q. - so in to an action on y award, and what is a reasonable time
 bonds, and is to be determined by y Jury, and so far as regards
 contracts, due y plea of payment, it is wholly unnecessary, for y party who
 immediately. is to pay the money. is to pay it to y other at his peril.
 as soon as The same rule applies to Contract. 1 Keb 39. 9. Strange
 entered into. 353. 903 Barnard 84. 15. 463. 1. Keb 72. Ryd 204.
 Jenkins 136. Ryd 26;

Awards must be final.

another requisite to a valid award, is, y^t it must be final
 12. it must settle and decide forever y controversy awarded upon. and it must be final in its terms at y time of making it. for y character of the award is determined by its appearance when made. Ryd 208, 15. 16. 6 Mod 232 -
 1 Roll art 15. 16.

Hence it is held y^t an award, y^t each party shall be nonsuited' in causes that are pending is ill, For a nonsuit does not settle y controversy, as a new action may be commenced the next hour for y same cause or subject matter.
 6 Mod 232. Bernard 463. Ryd 208. 11. Ibid.

And yet it is held y^t an award requiring an action to be discontinued is good. Now I can't see how y^s rule can be reconciled with y former, for certainly discontinuance in itself is no more an extinguishment of y cause of action, y^m a nonsuit, and the only ground there can be for y^s distinction must be, y^t y Ct will interpret it to mean

367
yt y cause of action shall be discontinued forever, and
there it will amount to an extinguishment of the cause
of action. *Ibid*

On y other hand an award yt y Plff in a
pending action, shall enter a "retrascit" is final - as
y "retrascit" has y effect of a total extinguishment of the
cause of action. *Rya* 211. 15. 1. Roll 7. F. Arb.

So an award yt all suits between y parties shall cease,
is final, quia y Ct say y award shall be construed yt
y suits shall cease forever. 2 Mod 33. La Ray 151-95. 64.
Palk 74. 15. Johns R 304. 1024 Strange Contra. Cro 6.
525. where it is said yt an award yt one party shall
not prosecute his suit in y same term, was final. I see
no possible reason for this, and it contradicts y former.

Rya 211. 211. 1. Johns R. 304.

It was decided in y time of La Ray Mansfield, yt an
award that each party shd pay his own charges
in suits pending between them, was final, quia says the
Ct, the meaning is, yt y suits shall cease forever. 1. B 274.

An award upon a bond, yt y obligee shall not prosecute
y obligor, is held to be final, and upon the same principle,
an award enjoining A not to prosecute B upon his
bond, is in effect ordering him never to sue, wh is virtually
an extinguishment of his action. *Rya* 212. 1. Roll Arb 67.

Strang 903, 903. 1082.

1. Roll Arb 0-7

But an award yt the Def. shall pay y Plff for certain
articles, provide y Plff prove the delivery of them, is ill,
it not being final. Comb 456. *Rya* 216.

Awards must be mutual.

A further requisite to constitute a valid award, is yt it
must be mutual, or it is not valid. By y^s Rule, it was
formerly understood, yt something must be expressly
awarded each party, or y award was void.

Says I G - y^e little embraces more arbitrary rules yⁿ any
 othe^r little. Awards.

This was omitted per mistake

389.

Hence an award ~~shd~~ yt one party shd go quit of all actions vs him by y other party, is ill for want of mutuality, quia there was nothing awarded to be done, for y latter party. For vs and other cases of the same kind. Vide Hyd 218.19

All yt is necessary to constitute yt mutuality, is wh y law requires, is, yt what is awarded to be done by one party, shd be a discharge to him from y claims submitted vs him. Now an award yt one party shd go quit of the claims, is in effect such a discharge and wd be good at ys day.

In deed ys rule requiring mutuality, is only another mode for expressing y rule, yt every ^{award} ~~rule~~ must be final
Hyd 219.20

Formerly where any thing was awarded vs either party, it was deemed ill, unless a release was also drawn in his favour. This was said to be required for y sake of mutuality. Hobt 49. 3 Keb 140.

notwithstanding ys general rule, it was always held yt an award ordering y paymt of money in considⁿ of a debt due to the other party, was good, and y reason given is, yt it wd amount to a discharge of the debt, 8 Co 98.98. A. 1. Roll Arb R.5.

So again if yt wh was awarded vs one party was expressed to be in satisfaction of a claim submitted by y other party, was good, tho no release was awarded. Comb 439. 146. Ld Ray 246.

Again an award yt one party shd pay s so much money to y other party, for a trespass committed by him, was good witht a release, for y word "for" implies yt it was to be in satisfaction of y Trespass. Cro S. 354. Hob 49. 1 Lev 132. 1 Burn 277. 2 Vent 221. 2 Comb 212. Hyd 177. 223. 3 Keb 140. Burrough 1. Lev 58. 2 Mod 225.

The rule now is, yt the awarding simply of the paymt of a debt, or the performance of a duty, is satis witht a release, or expressing in y terms of the

award y^t y^e paymt was in satisfaction of a claim submitted on the other side. For it must have been intended as such compensation, and y^s is y^e only rational construction. Com R 328. Ryd 226. 1. Johns R 304. 3 do 253.

How Awards Construed

Formerly awards were construed with y^e greatest rigour, for the slightest and were often sat aside for very slight inaccuracies - verbal inaccuracies. 98. Cro J 148. 9. 1 Roll Arb a. 15. 9. 6. 2. 6

Could -

Indeed olim in y^e minds of y^e Judges of Westmester, there was a great prejudice vs arbitrators. 2d Flott declared. he knew ^{never} any good to come of ym,

But y^e opinions of Jurists so far as regards arbitrations, have undergone a great change in consequence of w^h a more liberal construction has been adopted, and awards are now construed like deed according to y^e intention of y^e parties or arbitrators Palm 108. Flott 9. 3 Buls. 666. Ryd 230.

Thus an award y^t all actions between y^e parties, shall cease, it is now construed to extend to those only w^h were commenced at y^e time of y^e submission, and not to any w^h may have arisen since making submission, and prior to y^e award. Olim for want of y^e construction, y^e award wd have been void. Ibid et Ryd 230.

First deed.
and last mill-
mill govern.

and if there be an irreconcilable repugnancy between diff^t parts of y^e award, y^e former ^{part} will stand and y^e latter be rejected. The converse of this rule holds in Mills. Ibid.

That w^h appears by manifest implication in an award, has y^e same effect, as if it were expressed in terms.

The Rule is the same in Contracts and pleadings. 6 Mod 35. 2d Ray 965. 612. 1. Roll Arb 12. 16. 16. 16.

Ryd 30. 1.

except pleas of
stoppel and
abatent - est
Secus - with
these.

Where an award positively directs an act to be done on one side, and the act to be done on the other, is in nominative absolute, y^e latter is deemed imperative -

Thus if y award directs yt A shall convey a bond to B. In contract
B paying such a sum to A. This latter clause is construed the nominal
imperatively and not merely as a condition, and has y same absolute is
effect, as if the words were "he shall pay" 1. Lid 54. Rya construed as
231. a condition.

And an award of any thing in satisfaction of all demands,
is now construed to include all such demands, as existed
at y time of making y submission & is therefore good. For
it is not to be presumed, yt y arbitrators intended to include
any others and if they did, so far it is void 6 Mod 35.
Rya 233.

An award yt one party shall pay a sum of money
in satisfaction of a claim submitted by y other, is imper-
ative upon y latter party, yt he shall receive as a
satisfaction of the claim or else be barred of his claim.
The rule means then, yt he shall not have it at his
election to receive, or not 6 Mod 35. LR 635.
Rya 31.

And a misrecital of the submission in the award, does
not of course invalidate y award. Thus if the arbitrators
in the award, profess to recite y submission, and misdate
it, it is of no consequence provided, they recite y substance
of y award, the date strictly speaking is not any part
of the submission, it being a memorandum of the time,
of making it. 2 Mod 189. 1 Vent Talle vs Dawson, Allen
85-7- Tolle 184.
Rya 235.

If the award purport to be "of and upon y premises." The
and directs yt all actions shall cease between ym rule is y
it is restricted in construction to only those controversies same, if they
yt were in existence at y time of making y submission words are omitted
and I trust, at y^s day, yt y rule wd be y same
if y clause of "ita quod" were omitted. Cro E 861.
Cro J 285- Rya 238. 238. 1 Roll Abr O. 5. M. 1.

An award of a sum of money now in controversy
is explained to mean yt the sum was in controversy

at the time of y submission as well as of the award made
 & therefore at ys day it is good, tho' olim it wd have
 been secus. Cro East. 861. Cro G. 285. Ryd 238-

Whether an award of general release witht limiting it to
 y time of y submission is good or not, is a Ques. about which
 there has been much diversity of opinion,

But at ys day there is no doubt, but yt such a release
 is good, for it will be construed to extend only to such
 controversies as existed at y time of y submission. 3 Lev. 188.
 344. 1 Show 282. Mod 590 3 Feb 253. Ryd 238. 42-52. 1.
 1 Show 272.

And at ys day it appears, yt an award enjoining a
 release of all controversies, when y submission is of one claim
 only, is good as to yt particular claim, but has no effect
 upon any other claims, yt may be in existence 2 Bl R
 117. Ryd 239,

And if an award is made ordering a release of all
 claims up to the time of y award in express terms, it was
 formerly held to be void in toto, but the arbitrators had
 expressly ordered a release of all claims yt had arisen
 subseqt to y submission and prior to the award. 3 Lev
 128. 344. Roll Arb 17. 2.

It has since been held, yt such an award, is good, as
 to y time of y submission. I E. as to all claims arising at
 the time, the award is good. and void only for the time
 subseqt to y submission: and yt an action will lie for
 non performance, so far as it is good. but no further -

Indeed under such an award ordering a release up to
 the time of the submission award made, a release given
 or tendered of all controversies up to y time of the submission
 is a good performance on his part. For it is performing
 all y award can require of him, tho' not a literal

compliance with its terms, and ys appears to be y rule
yt now governs the construction of awards. 2 Ro 1119.
10 Mod 202. 6 Mod 335. 12 Mod 116. 2 Heb 431. 2 La
Paymd 964.

Indeed the principle yt has governed y
construction of awards in Modern times is yt they be so
construed, that they be not defeated by subtle and frivolous
objections. and when y intention can be discovered, it will
most generally be adopted - 1 Burr 377. Ryd 242. 2.

awards may be void in part & Good in part.

Formerly if an award was void in part, it was void
in toto But it is now held yt tho' it be void in part,
yet it may be good for the residue - and ys is analogous
to other rules at C.L. 12 Mod 534 Ryd 156.

part 242

It is a rule yt if an award is void in part as
to what is ordered to be done by one party, but is good
as to y Rest, he must perform yt part wh is not void
as it stood by itself, and it is not competent to him
to object to y whole on account of y part wh is void -
For a part of yt ordered to be done by him being void,
of course diminishes his obligations unless the opposite
party cd object to the performance of his part on account
of want of remedy, to enforce the part wh is void on
the other - 1 Roll Arb 126 - Ryd 244 -

As if the submission be of one particular claim
and an award is made, ordering the party to make
satisfaction of the claim and also for another wh was
not submitted, now as regards y latter, the award is
void, tho' he shall be bound to perform the former -
2 Roll R 46 - 1 Roll Arb 155 - Ryd 244 -

Again on a submission between A et B the arbitrators
shd award yt A & B shd pay to C, so much and he
shall give a bond with 2 sureties for y sum - Now he

3/4th
He cant
compel any one
to become surety
and therefore yt
part of y^e award is
void - being
unreasonable.

cant be obliged to find the sureties, yet he is bound to give
his sole bond for yt sum and is not allowed to object
to the validity of the award. 2 Lev. 6 Cro E. 432. 3 Lev
62. Dyd 244.

Again if y^e arbitrators award yt one party
and his wife shall live a fine of lands to the other party -
This award tho' void *quo ad* the wife is still obligatory
on the husband 3 Lev 290. 2 Keb 759. 290
and an award yt one party shall convey lands to the
other for life, with remainder to a stranger in fee - This
tho' void as to y^e estate in fee to y^e stranger, is still binding
for the estate for life. 2 Keb 759. 2 Lev 3.

But on the other hand, if that part of the ^{award} ~~estate~~ wh^{ch} is
void, is so connected with y^e rest, yt manifest injustice
will be done by enforcing it the part wh^{ch} is good, the award
is void for the whole. Cro E. 584.

Thus where something is awarded in favour of one
party as an equivalent to what is awarded in favour
of the other. if then that wh^{ch} is awarded to be done
on one side is void, so yt the performance cant be
effected, y^e whole is void. Because the mutuality wh^{ch} the
arbitrators intended, cant be preserved. 1. Roll Arb
N. 9. Belmont 98. Cro E. 577. 8. 10 Mod. 281. 2 Savind
293. 1 Lev 3.

Id. Coke says. if several acts are awarded to be done, on
one side, in satisfaction of one act to be done by the other
party - and if any one of ~~these~~ these acts are in the submission
however slight and trivial y^e all the other acts are void.

Still the award will be binding on the other party.
even tho' it appears to have been the intent, yt one act
shd not be a plenary satisfaction for the thing to be done
by the other party. 11. Co 131. 2.

This however is not law and deservedly denied in
12 Mod 587. 1 Lev 170.

Form of Award

Where the submission is verbal, a verbal award will be good, unless y terms of the submission require it to be in writing. But if there be a provision in the verbal submission, yt the award be in writing, it must be written. 2 Bulst 312.

And tho' the submission be by deed, yet if there be a provision, yt the award may be verbal, a parol award will be sufficient. 2 Vent 240. Rega 262-116. Dyer 155.

If it is provided yt y award be by deed indented and an award tho' under seal, yet not indented will now be good. And valid. Secus Olim - The indenting being mere matter of form wth the good sense of later times, has considered as wholly immaterial. 3 Keb 125-512-1. Sid 262.

If it is provided in y submission, yt the award be under the hand and seal of the arbitrators, signing or sealing alone, will not be satis. and the reason is yt signing and sealing are both necessary to the authority of the arbitrators. 3 Falk 44. Palm 107. 12. 121. 109.

Regd 262

Where y submission is with a proviso yt the award be made of and upon the premises, the award need not expressly purport to be made of and upon the premises - for it will be intended yt they did make it upon y premises - unless it appear yt they did not on the face of the award. or untill the contrary be shewn. 1. Keb 431. 865.

Regd 263.

Performance, what it shall be?

A substantial compliance is satis, tho' it be not a literal performance of the award. For a literal performance is not required. This is also, a rule in the Law of Contract - where a substantial performance is a performance in Law - 3 Buls 67. Regd 264-5.

Hence if the arbitrators order a general release to be given up to the time of the award made - a release given or tendered up to the time of submission, is satis, for it is a substantial performance of the award - 1. Lid 365 - 6 Mod 34 - 12 Mod 8 - 117 - 587 - 9.

Where a part of what is awarded to be done by one party is void and part valid - the award is substantially performed on his part, when he has performed the part of it, wh is in itself valid -

Where the concurrence of both parties is not necessary to the performance of the award - each party must perform his part witht any reference ^{to} or request from y other -

1. La Ray 334 . 2 Falk 136 - 403 - 2 Feb 265. 6

But if the award ^{be y} one party to do an act after or on the performance of an act by the other party, there is in this case, a priority of performance, and the latter party must do the act awarded to be done by him - before the former can be required to perform his -

For the performance of the one, is made a condition precedent to the other - Ibid 3 Feb 608 - Raym 169 - 2 Butts 107 -

If the party in whose favour the award is made, accept a performance differing in circumstance from the terms of the award, still the performance is good. Thus if it be awarded y^t one party shall enfeoff the other in a piece of land, and at the request of the other party he enfeoff I G. and himself in the land - this is a performance sufficiently within the exact words of the award - 3 Buls 67 - Ryd 287 - or 207.

Where one party does all in his power to perform - and is prevented by the other party - the former is discharged - Such is the rule in in the law of Contracts

Thus if the award be y^t A shall erect a house on the land of B. the other party, and A tenders the work, but B forbids his entrance on the land, A will be discharged from all obligations. *Ryd 208 268*

An award y^t all suits shall cease between A and B- is not broken by a prosecution of a suit vs B and C jointly - for the award is construed to extend to suits between A and B- only, and not to cases, where B may be jointly liable with a stranger to the other party. *10 Mod 204-5- Rid 272-*

So an award y^t one party shall give to the other a bond or other obligation for a sum of money- the award is fully performed, when the obligation is executed- tho it never be pd according to its tenor- Non payment is indeed a breach of y^e condition obligation, for w^h an action will lie upon the obligation, but it is no breach of the award, as he is then functus officio- as to the award. *Stran 403- 1082- Ryd 274- Barnardiston 263-*

Remedy to Compel performance

The act of submission even by parol implies a promise to perform the award when made, an it be for the payment of money - or to do some collateral act.

It was formerly held y^t if there was no express promise to abide the award, the Ct wd not imply a promise to do any collateral act, or thing. *Bro E 861- allen. vs allmn. 69. 70. 1. Ld Ray 248- Ryd 11-11. 238. 76-*

The consequence of this rule was, y^t when the submission was by Parol, and the award ordered any thing, except the payment of money, there was no remedy to compel the performance of the award, unless there was an express agreement between the parties to abide the award.

Ibid Auth-

But yr rule is now exploded and at yr day, an action will lie upon an award to compel its performance, and y award be for a sum of money or to do some collateral act, where there is no express agreement to abide y award. Ibid - Ed. 276.

Where under a parol submission money is awarded to be paid to one party, the action on the award may be either debt or assumpsit - but y^r rule implies y^t y^e award is by parol or not under seal, for if under seal assumpsit will not lie to enforce it -

And where y award on a parol submission is of any thing
else y^r money, ast is y^e only action - for here is no debt
an obligation to do a collateral act, is not strictly a
debt, it is at most only a duty. 1. Leon 72. Cro. E. 287.
Ry 277. Cro. E. 354 -

When an action is brought on an award, y submission
An action may must of course be stated in y declaration, for y submission
be brought on the is y foundation of y award, as it is the foundation of the
contract to perform arbitrators authority - The terms of the Submission must be
the award - or truly alleged as in Contracts. 1st 923. 2d Lev. 2395. 235.
upon y contract Ryd 278-9-
to submit

In assumptio on a promise in y submission to pay a certain sum on request if y party shd not stand to the award. when made, a special request, must be made averred and proved. For the request is here made on condition precedent and the averment that, tho requested he has not pd, is not satis. 1. Bound 33. 2 Feb 126

Kyd 279.

In assumption of breach on y submission for the non-performance of the award, any number of breaches may be assigned. For in y^s case damages only are recoverable for the loss sustained by non-performance, and yt may arise on every breach, and is not like a bond one breach Red 279.50. of wh forfeits y whole penalty. Yelr 35. Lenk 264.

Where y submission is by bond, and y award orders the payment of a sum of money, an action of debt will lie upon y award as well as y bond. For if y award is not performed, y condition is broken, and y whole penalty forfeited, it is more usual to bring an action of debt on y bond. award.

But if y award is of any thing else, yn money, debt will lie upon y bond only. for y obligation wh y award creates to do a collateral act, is merely a duty, and not within y legal acceptance of a debt. 2. Strang 92. 3. Freeman 4/4. 15. 10 - Kyd 280. 1.

In debt on bond, y plaintiff usually declares on y penal part only, as if it were a single bill without any condition. The Def must then pray oyer of y bond, and after reciting y condition in his plea, he may then plead any thing wh constitutes a legal defence, as 'no award'. If ys is his plea, the Pltff must aver, yt y arbitrators did an award, and set it out in his replication, and then assign a breach - IE. in what particular the award is not performed -

To wh y Def may still rejoin, yt there was no such award, as y Pltff has averred, and y forfeits his former plea, of "No award" or if y award sett forth in y replication is defective, he may demurr to it. 1. Sid 321. or 71. 1. Saund 169. 2. Heb 361. 88. 3. Bun 1727. 30. 1739. 30.

In an action brot upon y award, y Pltff mus^t allege in his declaration every thing to shew, yt y award was made within y scope of y submission, and authorised, So where y action was brot upon y bond, he must do y same in his replication -

If y terms of y submission require y award under seal of y arbitrators, y Pltff must expressly aver yt it was so made - For where it is required to be by deed, no other award is within y scope of yr authority, Cro J. 278. 2 Mod 77. 8.

Carth 408. 2 Feb 166. 3 Mod 330. La Ray 115.

It is not necessary where y award is in writing to alledge y date of it, for y date is no constituent part of it, and if it be alledged to have made within y submission, it will be suffic; 6 Mod 244. La Ray 1076. Talk 67. 498, Talk 76. 499. Eid 285.

It was olim held to be necessary, where something was awarded on both sides, yt y Plff must alledge yt he had performed on his part, what he was ordered to do, unless by y terms of y award, the Def was to perform his part of y award first. as a condition precedent.

But ys allegation on y part of y ^{Plff} Def is now necessary only in 2 cases. First. where y part awarded to be done by y Plff being intended as an equivalent to yt awarded on tother side, is void and can't be enforced by y Def. In ys case it is said, yt y Plff must alledge performance or he can't recover. Cro. E. 284. Ryd 18. 238. 467. S. 287. 1 Roll arb N. 9. Ryd 218. 87.

I G. ys case is incomprehensible. for as we have seen such an award is totally void ab initio and also yt y character of y award is to be judged of, as it was, when made. and yt nothing ex post facto can make it good or bad. how then can ys avermt of y Plff make it good?

Second. where by terms of y award, performance by y Plff is made a condition precedent, there undoubtedly he must aver performance or tender of performance on his part before an action can be brot on y award.

The first class of cases, is the only one I G. think, in wh y Plff must aver performance on his part, before y action is brot vs y other party.

If in debt on award, y Plff set it out with ponofert, y def may demand oyer of y award and after reciting it

in his plea, he may take advantage of any defence the case admits of - as he may demur for any variance, or misrecital by y Plff, or any illegality in its construction, 10th 172. 2d Ray 415. 1 Burr 272. Ryd 284.

It where y Plff sets out y award without protest, y Def may plead "no such award" on wh plea, issue may be taken, and if y award set forth by y Plff differ materially from y real award, y def will have judgment.

On the other hand if there is no material variation between y award set forth by y Plff and the real award then y judgment will be for y Plff - Ibid.

When y action is brought on y award, y Def may plead, yt he did not submit, but is debt on a submission bond, such a plea in bar wd be wholly unintelligible.

For in an action on a bond, y Plff takes no notice of y condition, but declares upon y penal part only. Now, for y Def to plead in bar to such a declar - yt he did not submit, wd be nugatory.

And y Def if he wishes to shew y real cause of action must traverse over of y bond and then recite y condition. 2 Keb 73. 1. Ibid 290. Ryd 290.1. Strong 923.

If y submission is to arbitrators, and in default of yr awarding to an umpire - y plea of "no award", if made extend as well to y umpire as y arbitrators. For to say yt y arbitrators made no award, does not deny y possible fact, yt the umpire made an umpirage. 3. Keb 675. Ibid 291.2.

He who sues to enforce an award, must after setting it out at length, assign a breach - for y breach of y award is y gist of y action. The plea of "no award" being a denial of all cause of action, wd can't be

answered effectually, except by showing a breach, and y^e is true an y action is brot on y award or on y submission bond. 12 Co. 24. 78. 153. If y breach is assigned on a void part, y effect is y same, as if no breach at all was assigned.

Regd, 292-

But when part of y award is void, and part good, y void part don't make y whole invalid, Hence a breach assigned in y good part, will maintain y action.

As when y award orders a to give his bond to B. with surety. Now y award so far as regards y surety being void; so assign as a breach yt a has not procured any surety to be bound with him wd also be void. But as a is still bound to give his sole bond, it is satis. Satis breach to aver, yt has not done it. 2 Feb 601. Ld Ray 114. 23. 234. 3 Mod 309. 12 Mod 588. 85 Feb 292-

So if y arbitrators award money to be pd on request. In the assignmt of the breach, the Pltff must not only aver nonpayment, but also a special request to be made to y Def- Cro James 640 3 Feb 530. 30

Where an award is, yt one party shall do an act or thing in the alternative, y Pltff on assigning y breach must allege, yt y Def has not performed either of ym.

For y fact yt he has not performed one of ym, is still consistent with y possible fact, yt he has performed

So yt wtht alleging yt either is performed, he don't discover a complete right of action-

This is analogous to y assign rule relating to y assignmt of breaches in Court Broken- vide Title Court Broken-

Regd 296- If y action is brot on y submission bond, and there are several breaches of y award, one breach only by the C De. can be assigned. and this is stile y rule in Eng- Cts-

The reason is, yt one breach at C Law. is

a forfeiture of y whole penalty. Hence one breach alleged and found, has y same effect as any numbers wd have. Consequently y assignment of more gn one breach wd be duplicity. Com D. Arb L. 6. 2 Wils 67.

In Com. y Plff may assign as many breaches as there are, for he recovers damage for y loss sustained by y nonperformance. and ys may arise on every breach - As by y law of Com. he is not entitled to penalty.

The stat of Limitations is no bar to an award under seal for an award by lrd is not within y stat.

In Conn also, there is no stat limiting actions on y submission under seal. 2 Pound 64 2 Feb 404 497 533, 36.

Where to debt on bond y Def has pleaded "no award" & after reciting y condition pleads "no award" to wh y Plff replies by setting out an award and assigning a breach, y Def cant in general rejoin any defence, except yt of "no such award". He cant plead performance, for yt wd be a departure from his first plea. 1 Feb 414. 34, 678. 2 Feb 156. Com D. Arb L. 6. R F 7.

But where y Def to an action on y submission bond, has pleaded "no award" and y Plff replies by setting out an award, wh appears defective on y face of it, y Def may demur, and y Demurror fortifies y first plea of "no award". Ryd 300. Jenkins 116.

If y submission is gen, i.e. of all matters in controversy, between y parties with y clause of "ita quod" ~~BCC~~ y Def after reciting y condition, may plead yt there was no award made of and upon y promises. Thus negating y clause of "ita quod" and y Plff in his replication sets forth an award of certain particulars, the Def may rejoin yt there were other matters lrd before y arbitrators, on wh ~~was~~ they made no award, so yt y award was not made of and upon y promises.

Cro E. 200. Palm 54. Kyd 300.

In an action on y submission bond, if y award is ill, y Def may instead of pleading "no award" may recite y award in its place and ~~you~~ then aver yt y arbitrator made no other ^{his} award, and if y Pltf demurs to y plea, y def must have judgmt in his favour, Cro E. 833.

On y other hand if y award is valid, and y Def performed he may and ought to sit it out in his plea, and then allege performance. For it will not answer to plead "no award" if he relies upon y performance of a valid award, for his defence. In short, there is no safety in pleading "no award" in none in fact was made, or in yt wh is made, is a legal nullity. 2 Keb 238. Cro E. 339. 2 Buls- 93. 93 Kyd 301.

So where y award is void in part and good as to y residue, it is satis for y Def. to allege performance of yt part wh is good, wth noticing yt wh is void, for yt imposes no obligation on him. 8 Leon 62. 1. Roll arb F. 2.

Where by y terms of y award, y Pltf is to do y first act, as a condition precedent, it is satis for y Def. to allege yt y Pltf has not performed on his part, and ys plea is a good bar to y action. Mr Kyd advances a proposition wh is by no means correct. 12. yt y Def. must not only allege non-performance on y part of y Pltf, but must also aver yt he is ready to perform, as soon as y Pltf shall have performed on his part, Now ys allegation of readiness is wholly unnecessary and besides readiness is not issuable. Kyd 302. 1. Roll arb F. 6.

Where y Def undertakes to set out y award in his plea, but does not set out y whole award, and avers performance of y part set out, the Pltf may pray oyer of y award, and charge y Def with a breach ~~in~~ in y part not recited in his plea. Kyd 306. 3. 6. 3 Lev 165. 1. Tard 326

If from y default of y Def. no award was in fact made according to y submission and y Def. pleads no; award the Plt may reply and aver y fact, yt y Def. revoked y authority of y arbitrators or any other means by wh y Def. prevented y arbitrators from making an award, and y's reply will support his action on y submission. 8 Co 81. 1 Vent 71. 2 Kel 624. Ryd 360. 310.

Where y submission is by bond (origly) and y parties have by a subsequent agreemt enlarged y time for making y award, and y award is made after y time limited in y bond, has expired, an action for nonperformance of y bond will not lie on y original bond, For by y condition of the original bond, y award must be made, before y time, by y supposition, it actually was. 3 TR 592. Rid 310. 11. 276.

In nonperformance of an award under a reference at Nisi Prius, Cts of law wd not olim grant a process of contempt in order to enforce performance, but wd leave y party to his action on y bond or y award.

For submissions at Nisi Prius were not authorized by Stat of Mm 3d as yt extends only to cote in bank. 1 Kel 130. 8. 559. 2 Kel 23. 645. Ray 35.

But y common rule at ys day is, to grant attachment for contempt even where y submission is under y sanction of a Ct at Nisi Prius, 2 Bl. R 991. Talk 71. 3. 8 TR 87. 5 East 189. 10 Mod 333. and in Chy. to compel by a Decree.

A party may have y's process of contempt, even tho he has brot an action on y submission bond, and obtained judgment, for yt don't take away his right to proceed by contempt a disagreeable and most unfortunate attachment.

Talk 73. 10 Mod 333. But a contempt dies with y party guilty of it, and can't be prosecuted vs his representatives after his death, and they must be proceeded vs, by action on the bond or award, Pre Ch 223. 2 Bern 414.

The granting of attachment for contempt is however discretionary with y Ct, for contempt as such is not an injury vs y opposite party, but an offence vs y law, and as y Ct are not compellible to issue a process of attachment, they will not do it, if there is a great contrariety of Evi respecting y contempt, and will leave y party to his remedy at law. But y process of contempt however when issued is made y means of enforcing performance of y award. Per 695. Ryd 317. 332 & note.

Hence if y Ct are convinced yt y award is a hard one, vs y party against whom y application is made, they will not issue an attachment. For when y power is discretionary with y Ct, it is said, they will not exercise it vs obvious principles of Equity. 1. Burr 278. Ryd 318.

Where y award is made under a reference by order of a Ct of Equity, yt Ct will gen decree a specific performance. 1. Atk 74. or 62. 1. Equity Cases 51. 2 Vern 24

Where y submission is by mere act of y parties, without y intervention of a Ct, a Ct will not interpose in y summary mode, i.e. by attachment.

Still where y submission is by mere act of y parties, if one party has accepted performance by y other, a Ct of Equity on a bill filed for yt purpose, will decree a performance on y other side, viz y thing decreed to be done, is contrary to yr policy. 2 Bent 243. B.W. 187. Ryd 319. 324.

These are y ordinary modes of compelling y performance of an award, and y party suing generally has his election of remedies.

Relief vs
Awards

Where y award is deficient in requisites, an objection may be taken to it in an action upon y award, and y rule holds an y submission is by y sole act of y parties, or under a rule of Ct. Ryd 327. Ambler 245.

Where y only object of y party is not performing y award

is to defeat it for defect apparent on, award itself, yet
 object can be obtained only in a Ct of Law, as Ct of Equity
 will not interpose in such a case, it being a maxim in Ct
 of Equity, yet whenever an adequate remedy can be had at Law,
 they will never interpose yr authority. *Ibid.*

But where y submission is by y mere act of y parties, objections
 arising from mere extrinsic facts can't be taken to an action
 on y bond or award - For as to such objections, y award
 is in y nature of a judgment of a Ct, and can't be impeached
 collaterally.

If then an action is bro't on y award or submission
 bond, and y award appears on y face of it to be good, it
 will be sustained. For y Def can't impeach it for any extrinsic
 fact - such as y misconduct of y arbitrators. 1. Lound 327.
 2 Bes 315. 2 Wils 149. 8 East 344. Ryd 328.

In these cases where the objection arises from extrinsic facts,
 the only relief is in Equity, by a bill bro't to set y award
 aside and a Ct of Equity will interpose its relief in any
 mode the case may require, as if there be an action pending
 it will grant an injunction to stay y proceedings. *Ibid.*

Nor are these rules arbitrary, for no Ct of justice has
 interfered in the submission and the award appears on
 face of it to be good. Now a Ct of Law as it had no
 agency in y submission, has no cognizance of it, except
 in an action bro't to enforce it, and then if good, it
 must be enforced. But a Ct of Equity has y power to relieve
 us all unequitable claims whatever.

The same relief obtains in Equity, where y submission is by
 reference at "Mise Prius" for y submission not being con-
 templated by the Stat. of M^m 3^d, a Ct of Equity regards it
 as submission by the mere act of the parties. 1 Vern 159. 7.
 2 Alk 162. Ryd 330. 3 a et B. 2 Besy 451.

In a bill in Chy. bro't to set aside awards, it is not unusual to make y arbitrators themselves depts in y bill. This is gen done in it is stipulated in y submission, yt if a bill is bro't, they shall not be made parties to it, and when they are regularly made depts, they are subject to pay the costs.

It is not however in Count, usual to make ym parties.
2 Att 396. or 412. 2 Vesey 216. 18-

But if there be a stipulation in y submission, yt they shall not be made parties to y bill, y stipulation is binding and
How far a Ct of on motion, y Ct will order y names to be struck out.
law can enquire 2 Att 412. 13.

into awards, is ^Q But in no case will a bill lie to compel y arbitrators
very doubtful- to disclose y grounds of their opinions, or decisions. For ys
14- wd tend to destroy y force of all awards, as y arbitrators
might in every case be put to y trouble and expence of de-
=ending y opinions.

Still if any palpable mistake or miscalculation is made by
y arbitrators, it may be rectified in a bill in Equity.
Tho in ys case y bill must be bro't vs y party in whose
favour y mistake is made, and not vs y arbitrators, for
a mistake is inc wrong. 3 Att 603. Ryd. 332. 33
g-

Even where y submission is in pursuance of y Stat of M^m 32
12. a reference under a rule of Ct in bank a bill will lie
in Chy to set aside y award for any misconduct of y
arbitrators. For tho' yt it has given y same power to those
Cts, yet y grant of yt power to a Ct of law, dont oust
y ancient jurisdiction of a Ct of Equity.

It is a maxim in the Cts of Westminster hall, yt y ancient
jurisdiction of any of y higher Cts cant be taken away by
impulation. 2 Att 162. 404. 12. 2 Ves 216. 317. 2 Ves In
458.

Where a submission is under a rule of any of y

superior Ct., nothing it appears, except y misconduct of y arbitrators, will ground a motion to set aside y award in y Com Law Ct., of wh y submission is made a rule. Now a Ct of Equity may set it aside for many other causes.

Objections apparent upon y face of y award, will not support a motion to set aside in a Ct of Law. As the Stat has not given ym power to set aside awards for y cause, an advantage of such objections must be taken in another way. 1 Str 301. 4 TR 713. 1 East 76. 270-

The principle of y construction is a supposition yt there is not in such cases any need of y summary relief, an objection arising upon y face of y award is a good defence to an action bro't on y award or y submission bond.

But y objections arising upon y face of an award will not ground a motion to set it aside, yet they may be satis to defeat a motion for an attachment for nonperformance, as y is a very different question and y Ct will not in its discretion subject a man for not obeying yt wh imposes no legal obligation upon him. 2 Burr 701. 4 TR 73. Ryd 342-

Extrinsic causes

The most frequent ground for setting aside awards may ground a is y misconduct of y arbitrators: but neither y or any other motion to set extrinsic cause will prevent an attachment for contempt. an award and 6. TR 161. 2 Vern 515. 1. B et O. 175. Ryd 346-

But intrinsic causes can't ground

For when any such proceeding is to be impeached a motion - quia it must be by proceeding instituted for y very purpose y latter may be of setting aside and disclosing y grounds of complaint - 162 in bar to: Now a motion for attachment so far from being instituted an action to impeach y award, is for y express purpose of enforcing y award, but y former must

Not only is partiality, bribery, and gross misconduct especially alleg

of y arbitrators, but also many other acts, which imply in themselves no moral turpitude, may be grounds for setting aside y award. Such as refusing y choice of an umpire to chance. 2 Vern 101. 251. 485. Ryd 346-9.

It is no objection to award of an arbitrator, yt he availed himself of y opinions of 3 persons in framing his decisions, tho ys decision wd be fatal to y verdict of a Juror, 1 Ryd 351 note. 5 Ves. Sen 846, Ryd 350 note.

If an arbitrator has interest in y controversy submitted to him, a Ct of Equity for ys cause, will set y award aside. 2 Vern 251. It is said, yt a plain error in Law coupled with other circumstances may be a ground for setting aside an award in a Ct of Equity. 2 Vern 251. 750. 3 Atk. 495. Ryd 349.50.

S G. how is ys rule to be understood, as we have already seen yt arbitrators are not bound to follow y law. The true limitation of y rule is, yt if y arbitrator understood y law, but adopted a rule of justice of his own, and varying from y Law, as better calculated to do justice to y parties, there y award is valid, and cant be set aside, But on y other hand, if he intended to follow y law and mistook it, there y award may be set aside for y mistake. 3 East-18. Ryd 341. 2-351. 4.

In accounting before arbitrators if it can be shewn, yt one of y parties concealed material facts within his own knowledge, y award may be set aside for ys cause, and Chy has set aside an award of y kind, and for ys cause, after it was executed. 3 Ast 735.

This rule however is not to extend by analogy to any other matters of fact, but is confined in general to y single case of accounting in wh cases y parties are usually sworn. For I don't believe the concealment of other matters of fact, wd furnish grounds for setting

y award aside, or it wd conflict with y general principle of law, yt no party is bound to furnish law vs himself. 2 Equity case 80 - Ryd 356. ~~55~~ 558

In one case an award was set aside in Equity, principally on y ground of excessive damages in an action for slander - This had seem a question not well calculated for a Chancellor to decide. But y reason undoubtedly was, yt y damages were so excessive as furnish a strong presumption of partiality, and in yt case trial was ordered to be had at Law and y damages were greatly diminished. 2 Bern 224 or 54.
1. Equity Cases 49. 50.

And where a submission is under a rule of Ct, either in Bank or Vice Prius, y Ct may send back y award to be reconsidered by y same arbitrators, provided there is evidence yt they had not satisfied materials before them, from wch to form an equitable award. 2 Plc 78. 1. 781. Ryd 359.

If an award on y face of it, appears to be contra to natural justice, as well as law, a Ct of Equity will set it aside, at least it was so decided in one case, tho' y arb- at Law, may be not bound to follow y law, yet from y decision be set aside it appears, yt they are not allowed to deviate from Law, and in Equity, for natural justice. 1. Chy Cases 279. 80. cited by Ryd 359. 60, being inequitable.

How far an award may be pleaded in bar to a bill filed in Equity to set it aside, as conclusive in its favour has been much discussed. 2 Alk 395. 501. Mordaunt 209. 2. Eq. Cases 32. 80. 3 P Mm 315. 16. 3 Atk 496. 3 Plc 196. Ryd 360. to 68. 2. Anstr 579. 3. 50368.
At y^e day. however y point is fully settled, yt where a bill is filed in Equity to set aside an award, yt y award may be pleaded in bar, but y Def must also deny y extrinsic facts wch are y foundations of y Complaint - and if y Plt can prove those facts alleged in y bill, he may have a decree to sit y award.

aside. It seems y^t tho' y award may be pleaded in bar, yet y case must stand on its own merits after all, wh^{ch} is y only rational conclusion, for it wd be nugatory even to attempt to obtain relief, if y award might be pleaded in bar. to y Bills. 2 Ark 506. Kyd 378, 83.80.3. Andr 735.

How far may an award be pleaded in bar to an action on y original claim?

an award ^{pleaded} the effect of an award in y^s respect is like a judgment obtained in bar is similar in a Ct of Law, and if an action be brot upon a claim wh^{ch} to an judgment may be lawfully submitted to arbitramt, it is a good plea in bar, tho' there th^{at} was a submission, and y^t there has been an award upon it. 2 Saund 292-2 Keb. 936. 1 Do 754, Contra 381.2-
OJ

But an award to have y^s effect, must possess all y qualities of a valid award, and if y Def^{endant} does not allege performance on his part, y award must be suet y^t y Plt^{aintiff} has a remedy to compel performance.

And it is said y^t if y Plt^{aintiff} can't compel performance, y Def^{endant} must allege performance, or it will be no bar, Now if y Plt^{aintiff} can't compel performance, y award quo ad hoc, is totally void, and I don't see how a voluntary performance on y part of y Def^{endant} can make it good.

Again where y award creates a new duty, it is sd it is a good bar to an action on y original claim, because y award gives y Plt^{aintiff} a new remedy—

But on y other hand an award merely extinguishing an existing duty, as where mutual releases are awarded, it is sd it is no bar to an action on y original claim, tho' bringing such an action may be forfeiture of y submission bond. submission bond. Id Ray 284. 12 Mod 130, 248.
Curb 440- Falk 69- Kyd 383-4
Cumber

But y proceeding rule is now overruled, and y law is now, yt an award ordering mutual releases, only, is as good bar to an action on y original cause, as an award creating a positive duty— Ryd 384.

An award however not extending to y whole controversy submitted is no bar to an action on y original cause— For in ys case y award is deficient in requisites. Ld Ray 612— Ryd 384—

Apt brot for labour done, and goods sold— are not mentioned: y Pltff alleges an award— y Def may reply yt it was

To an action brot after y time of submission and before founded on award, y Def it is said may plead y submission, and y consideration no award made in bar, as provided there is no time of Labour done limited for making y submission— award— and yt y article said nothing

But if y time be limited and y limitation has expired, about goods y submission is no bar to y action, for there can be no valid award made Ryd 387.9 sold— ys will bar.

I can't conceive how a submission can ever be a bar to an action, on y original cause, where y submission is by y sole acts of y party, for y submission is revocable—

Whether in any case and how far it is necessary for a Def pleading an award in bar, to allege performance on his part, there olim prevailed a certain distinction wh are not now regarded 1. Keb 848. Roll wth F- 5 T. 1.3. Ryd 390-92—

It is not now necessary in such cases, for y Def ever to pled performance, except it is said, where y Pltff can't compel performance Vide ante

The principle of ys, Rule, is, as y Pltff has at any time his remedy on y award— the Def to aver performance, as y award is a substitute for y original cause of action— Ld Ray. 122— Ryd 190—

The first part of the paper is devoted to a general
 discussion of the problem. It is shown that the
 problem is of great importance in the theory of
 functions. The second part is devoted to a
 detailed study of the problem. It is shown that
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 functions.

297/201

200

201

202

203

204

205

206

207

208

209

210

Usury - how far it affects the
 validity of Contracts 415.
 The mode of taking advantage
 of Usury. 423. Penalties 425.
 What is Legal Interest 429.

(11)

money - and ends in such purchase and sale of property, at a lawful rate, y inference will almost universally be, yt y parties intended it as a loan, and if so it is void.

On y other hand exorbitance of price in an ostensible sale on a credit to y party applying for a loan, is in general a badge of usury. Thus A applies to B for a loan of money, but B refusing to advance y loan, offers to sell A goods at an extraordinary price. So yt A by ~~raising~~ selling y property at a reduced price, may raise y money, and A gives to B his obligation to pay y whole price together with legal interest, y contract is usurious as y Books express it, but more commonly it is evi of usury, and in general too strong to be resisted. 1. Atk 331. 2 Ves. 155. Broo Chy 149. Ord 77. 8. 113. 1. Equity Cases 91. 351. Ord 64, 74 - 7-8. 5th - 8 - 113.

And in such cases where a Ct of Equity relieves us y excessive premiums of usury. they will not set aside y original contract, and y price at wh y goods were resold, will be regarded as y amount lent, and y Ct will set aside y Contract, by y borrower's paying yt amount, and y legal interest thereon. The rule is y same when y amount advanced is part in money and part in goods. Esp R 40. Cowp 793. Doug 736. Tid. 7th 114 - 78

1. Brown Chy. 149. Ord 113. 14 -

But in y class of cases as well as y former, y decisive question on wh y fact of usury, or no usury turns, is an y transaction was in reality a bona fide sale and purchase, or an it was used only as a cloak to cover usury, and y criterion for determining y question is y same; 1. Esp R 402 Ord 79.

Where y party advancing reserves a right of redemption, or repurchase, y is a badge for usury, but by no means conclusive. This Rule supposes an application for a loan, and y person applied to refuses to loan money, but offers to buy his property at a low rate, and gives him a right of repurchase. This is considered as a badge of usury on y ground, yt an actual sale was not intended; and y property 78. can only be regarded as security for a debt. 2 Lev 7. 2 Rb R 259. 3. nile 390 see p 414

Usury

Usury may be defined to be taking or contracting for
exorbitant or illegal interest, for y forbearance of y principal
 Loan includes of a Loan. By y word "forbearance" is meant delaying y
 every debt, payment of y principal, and y "contracting for" is called y
 reservation of Interest. 2 Ab Com 454.

Interest is y Premium y borrower pays to y Lender, as a
 compensation for y use of y money, 2 Ab Com. 451. Old on
 usury 1.

The taking or reserving of exorbitant premiums for y
 use of other things yn money, may constitute Usury. and by
 y Eng State as well as our own, loans, of money, ware, merchan-
 -dises and other things for an exorbitant interest or premium
 may amount to Usury. 1. Hk 351. Topk 1770. 2 JP 2388.
 3 JP 351. 3 Nils 345. Tany 708. (Crop 114, 774. Id 164

Conn Stat
 title Usury.

Still a loan of other property can never be usurious
 unless y thing lent, is received as money, and with a view of
 converting it into money.

The law of usury at present is regulated by Stat both here
 and in Eng. But y taking of exorbitant interest, and at some
 periods of any interest whatever, was deemed illegal at C Law.

There was not at C L however any definite or fixed rule,
 regarding y legality or illegality of Interest. Indeed no interest
 seems to have been strictly legal, till y Stat 37 Hen 8th wh
 was y first Stat regulating interest or ever sanctioning it at all,
 The rate of Interest established by yt Stat, was 10. per cent.

37 Hen. 8th
 Chapter 9th

Palmer 242.

2 Ab Com. 454-5. 2 Roll 801 vide on usury¹⁷⁴ 31. 12. 19. 20. 31.

Usury was at C Law held an indictable offence, but still
 there was no definite or fixed rule, by wh to determine an y
 Contract was usurious or not, till y Stat Hen 8th

Stat of Ann
 given now
 in England.
 12th Ch 10th

But y Stat in Eng now regulating y rate of interest, fixes it
 at 5. per Ct per annum. and expressly declares yt any contract
 reserving any higher rate of Interest, shall be utterly void.

1. Alk 340. 2 Ves. 142. Ord 26. appx 7.

In y^e state and y^e same rule holds throught N.E. y^e rate is established at 6 per cent. In N.Y. y^e legal rate of interest as between individuals, is established at 7. per Ct. In y^t however most of y^r incorporated Banks, are restricted at 6 per Ct

In gen y^e Stats both here and in Eng relating to usury, forbid a greater rate of interest only for loans of money, wares, merchandize &c. but it is to be remarked in y^e construction of y^e Stats, any debt whatever is a loan, 1 East 195. Cowp 115-13.

Ord. 289.

The term forbearance is y^e consideration of y^e interest reserved, and on other hand, y^e interest is y^e consideration of the forbearance I.E y^e Creditor agrees to delay y^e paymt of y^e principal in considn of y^e interest and e converso, 1. Leon 96. Dyer 346. B. ord 28.

It is essential to constitute an usurious loan, or debt, y^t y^e principal shd be by y^e terms of y^e contract repayable at all events.

Thence if y^e principal of y^e loan is by y^e terms of y^e Contract, and bona fide put at hazard, y^e interest however great will not make it usurious. Therefore if a loan reserving 10. per Ct is by y^e terms of y^e contract never to be repaid, ^{no} in y^e event of a certain contingency, y^e reservation of y^e 10 per Ct. don't make it usurious, for here y^e lender is in danger of losing his principal and it is but reasonable y^t he shd be repaid for his hazard, Cro J. 208. 308. 2 Rb 458. 1. Wils 286. 3 Doug. 390. 4 B. 356.

1. Ves 143 4 TR 306. 1 Alk 341. 1 Ler 574.

But y^e hazard to wh y^e principal is exposed, must be a bona fide hazard, and not merely a coloured interest. ^{risk} Again must be a hazard merely consequential or incidental, is not such a hazard as will render y^e taking of exorbitant interest lawful. The hazard must be an essential ingredient of y^e Contract.

Such as y^e hazard of a debtors insolvency or knavery, will not warrant ~~more~~ y^e reservation of more yⁿ the prescribed rate of interest. Nor to bring y^e case within y^e hazard authorizing a higher rate of interest, it must be provided for by y^e express

terms of y contract. Vide last auth⁹ and also 2 Boscy
2 Ex 12 172. Ord 24.47.

The loans contemplated by y Stat⁹ on usury are not those in wh it is necessary, yt y thing lent be specifically restored. The rule laid down is yt such loans are not essential to constitute usury, and I conceive yt such a loan never can be usurious.

It is also said yt such a loan or bailmt can't be usurious ni it be merely a cloak for usury. for in such a case y premium pd to y owner is in y nature of a compensation for y inconvenience accruing to him for parting with y horse and also y supposed injury done to y animal Ward 26.

Now I can conceive no possible case in wh, such a bailmt cd be usurious. and y more proper as I think, wd be, yt all those loans in wh by y terms of y contract, y thing lent is to be specifically restored, no rate of interest or premium can ever be usurious.

That such a bailmt may be coupled with another contract, so as to make y latter usurious, I allow - as where a loans a sum of money to B. and at y same time lends him his horse to ride a short distance, at a very exorbitant rate, y may render y money contract usurious, but not y other.

Loans within y Stat⁹ of usury are those in wh y thing lent is to be repd with illegal interest 1st in kind, or in something equivalent, but not to be specifically restored.

It is not necessary to constitute usury, yt y agreamt for y exorbitant interest be made at y time of making y loan, or contracting y debt, for a contract to pay usurious interest for y delay of a previously existing debt is undoubtedly void and usurious. 6 Mod 303. 12. 30 385. 4 Bro Ch 30. 1 East 195. 2 Bl 464. Comp 115. 160th 531 Ord 28.

Thus suppose A sells goods to B, on credit, then y purchase money is considered as y vendors,

72.
left in y vendee's hands, and if at any subsequent times, B.
gives a note for y goods reserving more ym y legal rate
of interest, y note is usurious and of course void.

But interest exceeding y rate established by law is not in
all cases void, or rather usury, altho there can be no usury
ni y legal rate is exceeded, as where a contract is made
in a foreign country reserving only y legal interest of
yt Country, even tho it exceeds our own, it is regularly
18. as a general rule. § prima facie regarded as binding
and not usurious in our Cts, for in ys case as in most
transitory actions y lex loci governs. 1 P.W. 395. 2 Stb 52.
1. Equity cases 249. 1. Pl. R. 267. Tabbot 38. 2 Burr 1094. 78.
Ord. 31. 2. 55.

But where parties having yr domicile in one country or state
go into another and make a contract reserving therein
interest, wh the legal in y foreign country, is unlawful in
yr own, and for y purpose of evading y laws of yr own State,
such a contract would be deemed usurious, and y laws of
y country thus attempted to be evaded, wd doubtless prevail
in a question of usury. Co Litt 79. b n. 80. 2. n. 2. H Pl.
47 143. 412. B. & P. 114. 2 Burr 1077. 80. Ord n. 1. 33. note.

The gen rule then is, yt y lex loci contractus governs in y But a contract
case of a foreign contract; but where a judgment is rendered is made in N.Y.
upon a foreign contract, yt contract is then at an end, and more interest
y foreign interest is also at an end, and y interest accruing is y. per. to be
on y judgment is at y rate of interest established by our own performance in
laws, for y judgment debt is created here and y foreign another State no
contract is annihilated or merged in it. 2 Burr 1094. where y interest is
1. Pl. R. 267. 3 Ark 727. 1. Vesey 428. Pow on Mortg 421. is higher, is
242. void. G. G.

Again if foreign interest accrued upon a loan, is converted
into principal here, it will draw only y interest allowed
us by our own laws, y Rule holds, tho y rate of y foreign
interest shd be less, than yt of our own. 1. Pl. R. 268. Ord 35. 6.

The of reservation of more or of powerd rate of interest, is usurious, Yet a Contract originally reserving Compound interest, is not for yt cause usurious; but as such a contract is deemed oppressive and ruinous to debtors, Ct of Justice, both at Law and at Equity will enforce y^e contract only

a contract made for y simple interest. It is not usury, but as a rule of public
before y statute policy adopted to prevent y ruinous consequences of such
reducing y interest; Contracts. 2 Atk 331. 2 Hen Bl 144. 4. P. 613. 16.

mile carry y Tabot⁴⁰. l. alk 304. Bow on Mort 441. l. B. M. 662. Ord 367.
interest of principal. Because y interest when due, becomes principal.

But if y compound interest is voluntarily paid, it
of y State. can never be recovered back. But on y other hand, he who
upon y principle has paid usurious, interest, can recover y excess over y
yt no that shall legal interest
have a retroacting
effect=

Further if after simple interest has accrued on a bond,

have a rescinding
effect = Further if after simple interest has accrued on a ~~loan~~,
loan, y Debtor expressly agrees to pay interest upon interest,
y agmt is valid and Ct will enforce: his original
agmt to pay interest upon interest can't be enforced, for
as to y future y is supposed to be y time of his greatest necessity: but
interest, but only his subsequent agmt is not supposed to be so imperious.
y wh has accrued and public policy don't require y extension of y Rule.
accrued. 1. B. M. 652 - 4 T. R. 613. 16. Latk 449. 2 Bern 184. Pre Chy
I Could - 160

Again interest may be converted into principal, and may itself draw interest, and may itself draw interest by other means y or y amount of y parties. If for Ex a judgment is given for principal and interest, y interest then becomes a part of y principal and y whole aggregate sum draws interest together.

So also a report from a Master in Chy. 1. P/W
478.53. Pre Chy 500. 2 Equity Cases 530. 3 Attk 422
Pow on Mort 57d 3%.

The reason is, y judgment or report annihilates y original contract, so yt y distinction between principal and interest cant be observed, and y whole then becoming

one debt, interest is allowed on y consolidated sum—

Compound interest is sometimes reserved "in terrorem" to enforce y payment of Simple interest, when it becomes due and a Ct of Law will enforce such contracts, for y reservation of Compound interest is then nothing more yn a penalty, it is not Usury, nor is it forbidden by y policy of y Law. Full Cts of Chy, will relieve us it as vs other penalties, Salk 449. Bow on Mort 424 3 Blk 432. 2 Vern 316, 289. Acc Chy 160, 1. 3 Ark 520.

It is a principle in y law of Equity Usury; yt no contract can be usurious, ~~nor~~ ni it was y intention of y contracting parties to reserve a higher interest yn yt established by Law.

For y very language of y Stat and y terms of y Pleadings are, "yt it was corruptly agreed by ym" E3c, and y corrupt agreement is y essence of y Usury.

But by a corrupt intent, is not necessarily meant, yt y parties intended to violate y law or yt they ever knew what y law was on y subject, for as to ym, y maxim holds, "Ignorantia legis neminem excusat."

The meaning of y rule then is, yt y parties intended to reserve y rate actually reserved in y contract E3 and yt, yt rate actually exceeds y rate established by Law; and y fact an they intended to violate y law, cant be a question in determining y validity of y instrmt.

If y parties by mistake in framing y instrmt reserved a higher rate of interest yn they intended, and ys can be made to appear, then y contract is not usurious.

So again where there is a mistake occasioned by an error in computation, as often happens, y contract is not usurious— or in other words, it was not the intention, of y parties to reserve a higher rate of interest— yn is established by law— Cro E. 642— Cro E. 508. 677. 2 Blk R. 865— 1. Pro-et P 144. 157. Ord 59. B to 61. 2 Bent 82. 1 Ben 83, 807.

I have before observed yt where y principal of a Loan is by y terms of a Contract and bona fide, put at hazard, so yt it is not repayable at all events, interest however exorbitant wont render it usurious, as where A lends to B 100 £ under an agreamt yt B shd pay 80, £ to each of A's five children, who shd be living at y expiration of 10 years, it was held not usurious, for here y principal was bona fide put to hazard, as all y children might die in y intermediate time, and then y lender wd lose y whole of y principal, Cro East 741. 7rd 39.

note
32.

Upon y same principle, Bottomry and Respondentia Contracts are not usurious, by reason of y risk to wch y Principal is subject 2 Bb R 458. Cro L. 208-508. 1. Rb 358. 9. 7th 2 bes 154. Mars on Ins. 632-5 "See Insurance"

So on y same principle "post obit" contracts as they are called are held to be out of y Stat of Henry-

By a "Post obit" contract is meant an agreamt made by a borrower or debtor- in consideration of y forbearance of a given sum, to pay a certain larger sum in gross, on y death of another individual, proviso he y Borrower, or y lender, or both of ym, shd survive yt individual, secus he is to receive nothing-

Thus if A borrows of B £ 100. under an agreamt, yt he will pay B £ 1000 at y death of C. provided A survives C. secus if is not to receive any thing, ys is called a "post obit" contract, as y principal is not all events to be paid, but y repayment depending upon a certain contingency. y Contract is not usurious- 2 bes. 125- 1. Ark 301- 5 bes 82 27. 52

Such a contract however when y by a calculation of chances y excess appears altogether disproportioned to y risk, may be set aside in a Ct of Equity, as unconscionable, tho not usurious- 2 bes 125- 1. Ark 301- 5 bes 82 27. 52- 7rd 41.

Again when A borrowed £50 of B for wh he gave a bond for y payment of 100, on y marriage of a daughter, with a condition, yt if either Plt^r or Def^r died before y marriage, nothing shd be repaid, now y^s was holden to be no usury, for y marriage was a contingent event, and if y marriage were to take place, still y Def^r or Plt^r might die before. 3 Keb 304. 1. Alk 341. Ord 42. Cro E. 841.

With regard to stocks to Stocks, wh from yr very nature are, subject to extraordinary fluctuations; it is a gen rule, yt an agreamt to transfer in a future given day, in consideration of y forbearance of a debt, so much stock as y amount of the debt wd purchase at y time of y agreamt made; even tho y stock shd advance ever so much in y intermediate time, is not usurious, for y value of y stock is altogether uncertain and contingent.

This rule however seems to be confined to stocks alone—
8 East 304. 5 E's 164. 4 Bro Chy 28. 3 TR 531. Sugden 328.
1. Bes^{2d} 527

There are also several other specified cases decided in relation to stocks, for wh vide last authorities.

If money is lent on an agreamt, yt y lender in lieu of interest shall receive a certain share of the profits, and incur a share of y loss of y borrowers trades; y^s contract is not usurious, even tho the profits in y event shd be found to exceed y rate of interest allowed by Law, For y lender bona fide puts his principal at hazard.
2 Bur 891. Ord. 47. 2 Bes. In 245. 48. Bes 527. Sugden 328.

Ord 81.

It is held however if y lender in y last case was not by y terms of y Contract, to share in y loss as well as y profits, of y Trade, yt y contract wd be usurious, tametoi y principal wd still be liable to y creditors of y Concern— 4 TR 453. 353.

I never ed see why y^s distinction shd be made, for he must surely put his capital to hazard— Ord 47.

If indeed y trade is of such a nature yt in all moral probability, y profits will far exceed y legal rate of interest, it may then

be a cloak for usury, and I have no doubt, y^s is y^e case contemplated in y^e rule—

If a certain gain exceeding legal interest, is by y^e terms of y^e contract to accrue to y^e lender, y^e contract is usurious, even tho' y^s gain is not payable in money, but in something else; in other words it is not necessary in a contract, y^t y^e excess sh^d be payable in money, but is satis if it is payable in money's worth. Cro E 20, Ord 47.8

Again if by y^e terms of y^e contract, y^e Borrower has it in his power to avoid y^e excess of premium, y^e contract is not usurious; and hence it is y^t y^e subjecting y^e borrower to a penalty or premium, for not paying y^e loan on a certain day, is not usurious, quia he has it in his power to avoid y^e excess of premium by paying y^e loan at y^e time specified: and if y^s were usury, every penal bond wd also be usurious. This rule also includes y^e case of a mortgage deed, where the penalty annexed is a forfeiture of y^e Estate on failure of paymt; and here tho' y^e failure in y^e event transcend y^e amount of y^e loan indefinitely. Yet it is no usury for y^e Mortgagor has it in his power to avoid y^e excess by punctual paymt of the Mortgage Money.

Infra

Cts of Equity will relieve vs penalties, as being unconscionable, 5. Co. 69.6. Coup 112—795-6 2 TR 52-3 TR 531. 1. ALR 227. 1. ack 342-351. Ord 48.9.

Again if on a bona fide sale of property on credit, there is an agreement annexed, y^t if y^e vendee don't pay the purchase money on y^e day stipulated for paymt, y^t he shall pay an additional gross sum, it is not usury, but falls within y^e principle of y^e former Rule. Coup 112. Ord 57.8.

But it is Pecus. if y^e contingent excess of premium depends upon y^e will of y^e Lender or creditor, for has it in his power to make y^e debtor pay y^e additional rate, as if an agreement is made between y^e Creditor and y^e Debtor, y^t y^e Debtor will

pay more yⁿ y legal rate of interest if y Creditor requires it, such a contract is usurious and void, even tho' y Creditor shd not request y paymt of more yⁿ legal interest, for y character of y instrument was usurious and void ab initio and can't be made whole by any matter ex post facto" 1. Genst 253. 253.
V

It is not necessary to avoid y Stat of usury, y^t y interest shd be reserved annually, or made payable at any distant period; for y reservation of legal interest payable semi-annually, quarterly, monthly, weekly - or even daily, is not for y^t cause usurious. For y Stat does not require y^t y reservation shall be only for so much legal interest, but y prohibition of y Stat is, y^t he shall ^{annual} receive it at such a rate per annum. Cro Chy 282 Cro S. 25. 25. Ord 53.

It has been a question very much debated and about wh^{ch} there are many contradictory opinions, how far it is lawful for a Creditor advancing a given sum of money, payable at a given time, to retain y whole premium on y money loaned, by deducting it from y sum total. Suppose A borrows of B 100^l for 1. year, at 6. per Ct, and b deducts y \$6. out of y sum at y time of delivery, So y^t A in fact receives but 94 - On y^s point there has been much judicial, as well as extrajudicial dispute. On y one side, it has been contended, y^t y^s is no more nor less yⁿ a loan of 94. Doll. for wh^{ch} a premium of 6. has been pd, and it is usurious, quia y Premium exceeds y legal interest.

On y other hand it has been held, y^t it is nothing more yⁿ a loan for 100 Doll. and it must be regarded as a loan of 100. Doll at y legal rate of 6. per Ct, for y Stat don't prescribe when y interest shall be pd. For those contradictory opinions and decisions, see Cro S. 26. Noy 171 1 Buls 17. Ord 54. 102. 118.

It has been y practice of all banks and private brokers, universally, to deduct y whole premium allowed at y time of making y Loan, y^s is done upon every bill discounted at a Bank or Private Brokers indeed in y case of Bills discounted y principal seems now to be fully established at Law, Still it seems rather hard to reconcile it on principal. 2 Bb R. 493. Chitty Bill 54. Doug 223. 1 Bos et R 144 Ord 54

According to all y old authorities such a contract is deemed usurious and void. See Cro P 26. &c but according to modern authorities y Contract is valid. Vide last authorities.

Still y^s doctrine is sd to apply to negotiable paper and no other—such as bills of Exchange and promissory notes. Now I can see no reason for y^s distinction. Usage can be y only foundation of y^t rule, for one principle there can be none. Chitty on Bills 54. 3 Wils 262. Ord 102. 2 Bb R 493.

Notwithstanding y doctrine there can be no reservation of interest exceeding y amount established by Law, yet if y Lender incurs any accidental expence or trouble by y Loan, a reasonable compensation on y^s account won't vitiate y Contract. But in y^s case y extraordinary sum allowed, is not allowed as interest, but is meant as a fair compensation for y trouble of the Lender.

Thus if a bill payable at one place, is discounted at a remote place for y legal interest, and y Lender is at y trouble and expence of remitting; and besides y Person discounting y Bill is often entitled to a small commission; and to cover these expences, y Lender is allowed to retain a reasonable sum, without making y contract usurious. 2 Tb 52 n. 1 Bos et R 144.

This is somewhat of a delicate and dangerous experiment, for if y Jury believe y^t y incidental charges are a mere cloak for usury, i.e. if they are intended as an excess of premium 1 Bos et R 144—tho' under the name of compensation for extraordinary expence, and trouble, the contract will be set aside as usurious.

The rule is gen, yt in discounting a bill of Exchange, is by a deduction in favour of the Lender of more yn the established rate of interest, is usurious, 1. East 92. 4 T R 185. 1. Crompt 177. Pea R 200-24. 5 Esp 119. 1 Ph 55. 4 Maf 162.

See 2^o Conn R 175. where y^s principle is hardly dealt wth, it is then held yt this point is a matter of fact to be determined by y Jury - all other authorities regard it a matter of Their Law only.

This rule is carried so far, yt if B. discounts a Bill for A, deducting only y lawful interest, and pays y residue part in money and part in other bills, not yet due, wtht inclating y interest on y other bills wh^{are} not yet due, it is held to be usurious. 1. East 92. 1. B et P 144 154. et n. Peakes R 200.

With regard to y^s rule, usage it is said, may effect y question, and what wd seem amount to usury, may by common usage be lawful, and y contract by yt be saved from y fate of usury. Cowp 112. 2 T R 52. Ord on usury 518.

This however is a vague and dangerous rule, The doctrine is, yt usage of itself can never control y Stat on usury, yt it can never effect y Statutes, laws, and y only effect usage can have, as I conceive, is to rebut y presumption of an attempt to disguise usury. Thus far usage may undoubtedly go, but no farther. 1. Bos. et P. 144. 2 Day 483. 7. T R 185. 1. East 92. Pea R 200

But the^{re} where y facts are ascertained, y law itself must decide y Question of usury or no usury. Yet as to y intention of y parties to evade or circumvent y laws, wh in its nature is a question of fact, and must necessarily be decided by y Jury. 1. Bos et P. 144. 2 Day 483. Ord 59. a. b

In general there is no difficulty in deciding y question of usury, where y form of y contract expresses what it is in Substance.

But where y usurious extent is concealed by subterfuge, and artifice in giving y contract a diff form from what it is in substance; it then becomes a matter of no small difficulty to discover it.

It is a principal in y Law of Usury, yt every artifice used to evade y Stat. can only serve (when discovered) to bring it within its provisions. 2 Brown 404. 1 Show 180. Ord 68.9. 1 Show 8. Burr.

The most usual artifices used by users to evade the Stats, are the following.

I by annexing a colourable risk to y loan, i.e. where by y terms of y contract y principal is nominally put to hazard, but wth hazard is in point in fact is so trivial, as to render it apparent yt it is nothing more yn a disguise for usury. Ord 68-39.72- Hazard 418. 2 Bes, Sn 148.

vide auth
infra-

2^d by making a loan under y form of a sale of goods. 3^d by dry exchange, This is a loan of money secured by a bill of Exchange drawn by y borrower on a fictitious person abroad, where y bill is never sent and never intended to be sent, to wth a protest is obtained by y agreamt and collusion of y parties, and then y borrower is charged a supposed exchange & reexchange of monies, and also a great variety of other charges wth often amount to 20 per Ct wtht y lender's being subjected to an expense or trouble. Ord 66 1 Atk 351. 2 Bes 155- Equ Cases 91- Corp 112. 4 Bes 278. 4th by lending a stock to be replaced on a given term, with an agreamt for y payment of interest, on a greater sum yn y market price of y stock.

5th by an agreamt for y loan of money on a pretended partnership, by wth y Lender is to receive the exorbitant interest under y colour of partnership profits. Ord 66. 46 a b, 79. to 81.

6th By substituting for a loan y purchase of a life annuity, 7th by adding to a loan a lease reserving exorbitant interest, as where on an application for a loan, y lender says that he will advance y money at legal interest, i.e. 6 per Ct proviso borrower will take a lease of one of his houses at such a rent.

1 J. 146 403-
Ord 66
Cowp 1770-
Ord 66

Cro J. 440
Ord 67.

8th by y lender taking a beneficial lease in consideration of a loan of money made by y Lender to y Borrower. Ord 67.

1. Peck v. Elfrays. 115. 182

When a treaty commences with an application for a loan of money and terminates in any of y above expedients, it almost universally proves to be usurious, and y Ct will adjudge it illegal and void. 4 Leon 208. Ord 74.

1st when by y terms of y agreamt, y principal is put at hazard, by a risk merely nominal, or very slight, it will not take y contract out of y Stat; 18. it will not justify y reservation of more y'n legal interest.

Thus where A obtained a loan from B. to ^{be repd at} 10, per Ct interest, if any one of 10 persons ^{named} was alive at y expiration of one year, but if y ^{not} lender was to lose both principal and interest; now y^s contract was usurious, for such a risk is not a satis hazard, to warrant y reservation of extraordinary interest, for there was no probability, at all y 10. person then in good health, wd die in y course of 1. year. Ord 69. 72. 2 Bes. 142 Cro Eliz 642. Carth 67. Talk 394. Comb

92-

To take a higher premium out of y Stat on y ground 2 Bl R of hazard, y risk must go to y principal, and not merely ^{or 72. 503.} to y interest, for no degree of hazard affecting only y A Bottomry interest reserved, will exempt a contract from y fate of usury. Cro J. 408. 1 Alk 342. 50 2 Bes 154. contracts is

If therefore A obtains a loan at 10. per Ct interest, usurious, why y y interest payable only on condition, yt a person then aged risk is trivial. 90. wd survive 20 yrs, now tho y risk is very great, yet I J y contract is usurious, for y Lender is not in any event to lose his principal, y interest only being hazarded. Cro. J. 408. 1. Alk 342. 50. 2 Bes 154. 2 Bl R 563.

Again, where upon a treaty for a loan, a distinct loan is refused but y party applied to proposes to purchase of y applicant, an annuity or any other property whatever, on terms clearly more advantageous, y'n a loan at lawful interest

y contract is usurious. This case supposes an application for a loan, and terminating in y sale of y property, and its purchase at y low rate, for y purpose of avoiding y Statute.

It is true after all yt it is a question of fact, an y parties intended y purchase and sale, as a cover for usury; or an it is a bona fide sale; On y one case y transaction is illegal in y other valid. 1 Ves y Br 678. 4 Leo 208. Ord 57. 8. 65-74. This rule supposes a mutual communication for a loan, & such an one as to raise a satisfactory presumption, yt they really did intend to evade y Stat. It follows yt if upon investigation, y transaction appears to have been a bona fide purchase and sale, y contract is not usurious, but only a hard bargain on y part of y Bargainer, for a man has undoubtedly a right & to make a good bargain, if made bona fide without subjecting y contract to usury, or its fate. 2 Bl R 864. 1. Lid 182 - Ord 74. 5.

Filmer

Inadequacy of price on an ostensible purchase, may in some cases be a badge of usury, yet it can't per se, constitute usury, nor does it per se prove usury: it may however raise a presumption of usury, wh presumption is a matter of fact to be judged of by y Jury. 1 Keb 242 Cro 8. 232 - Cro 27. 1. Ves 164. 3 Mills 390. 2 Bl R 889.

This question of intention is in every case, a matter of fact to be submitted to y Jury; y effect of yt intention when discovered presents a question of law to be determined by y Ct. Salk 43. Doug 736 - 3 Bl 558. 9. 1. Bl Ct. P 181. 1. Esp R 171. 2 Bay 491. Strong, 1243. 1. W. 1778.

Cowp 112.

In all cases of y's description y decisive question is, an y contract was in reality a purchase and sale, as it appears to be in form, or an it is a disguise for usury - Cowp 112. 3 But, how! it may be asked is y's to be ascertained? The most usual criterion by wh Cts and Jurys determine it, is y's. if y transaction commences by an application for a loan of

turn back -
to y 1st p.
of y 2^d p.

Thus A applies to B for a loan of money, B refusing to lend y money says I will buy yr property at such a rate, (wh by y way is a low rate,) and you shall have a right to repurchase at such a price as we can agree upon" y^s is a badge of usury, tho' by no means a strong one.

5th y embarrassed situation of y party applying for a loan, of wh ends in a sale and purchase as above, is also a badge of usury. Thus if y person applying for a loan of money, is induced to transfer a beneficial lease by way of sale, and it is said to make no difference, yt y proposal for connecting y loan with y transaction moved from y quarter of y lease.

Schraules & Lefroy's Re. 19 L. 2. C. 301. Ord 69-83-4-

See view

6th the form of y security sometimes affords presumptive evi of usury, as where from y construction of y instrument, it can be collected yt y sale was not really y object of y transaction, but only a device whereby to evade the Stat. 5 Aff 278. 2 B. & C. 854 Ord 69. Still in these cases ultimately it is y substance of y transaction wh decides y character of y instrument, and not y particular phraseology of it. Bro Chy 28. Cow 112-

The subsequent acts of y parties may sometimes afford evi of usury in a contract. Such acts can never alter y nature of y instrument, yet subsequent ^{acts} ~~grounds~~ may furnish strong grounds, for presuming yt y contract was originally usurious. Thus if on a loan of money, y borrower pleads goods with y lender, and on application made to redeem ym, y pawnee refuses to restore ym, unless y Pawnee or borrower will pay him more ym legal interest. This is evi of usury- altho' there is no other fact from wh an usurious agreement may be inferred. 2 B. & C. 864 Bro S. 677. 2 K. & L. 357. 1 Bern 38. Ord 85- 2 K. & L. 531. 1 Bern 38. 38-

So undoubtedly of a security purporting to be for y payment of lawful interest, if it appears yt y debtor has actually paid before more ym legal interest, it will furnish grounds for

presuming an usurious contract; the 1st presumption alone might not be conclusive proof of usury.

When an usurious obligation is given, as a bond, deed, &c y fact of usury is always provable by parol Evi, quancum y solemnity of y instrument, and were it secus. y Stats of Usury wd be a dead letter.

Indeed y Rule is common to all illegal contracts whatever, for it is not to be supposed y any man wd set his hand and seal, or suffer another so to do, where y instrument is illegal upon y face of it. 5 Co. 69 B. Cro J 252- 4 C 26, 2

2 Wils- 347 3 TR 474 Peakes Evi 119. Bow Dec. 474-

To on y other hand if a written contract appears on y face of it, prima facie to be usurious, parol Evi is admissible to show yt usury was not intended by y parties, as yt it was a mistake in y Seminer- 53e, Cro J 501- 2 Mod 307 Ord 38. 68. 2 Bl Bl 865- Cro E. 463. 1 B et P. 144. 151. Cro E 643. Cro. Charles

501- Cro J. 508-

If a deed is taken to secure only principal and legal interest, but a separate security is given for extraordinary interest on y same debt, not only is y security for y excess, but also y deed reserving lawful interest, void and of no effect. and y reason is the whole agreamt is usurious. Cro J. 508. 8 TR 394, Coups 770. 96. 112. 14. 2 TR 238, Don Black 232-

Cro. J. 508.
3518 334.
Coulb 759.
720.
112.
117-

And y rule is y same where y deed is given for y security, of principal and legal interest accompanied by a parol agreamt to pay more yn y established rate of interest. The whole transaction is usurious and void. This last rule has been frequently decided by our own Ct, tho' I dont find any Eng authorities to point, it seems however correct on principal.

Bridg

The Question an a particular transaction not in form a loan, is in substance, ^{a disguised loan} is a question of fact, wh is said to be determined by y Jury in all cases. Str 1243. Day 736, Ord 87 and yet we find it holden on y other hand, yt it is y province

Doug
736

of y Ct and not y Jury, where y facts are all ascertained, to decide y Question of Usury or no Usury. Cro E. 507. 507. 8. 1. App 345 2 Ves 147. The first of these rules then appears to be laid down in too general terms, for most unquestionably, what constitutes a loan or sale, is a question of Sheer Law. 2 Conn R 192. Str 1243. Doug 736.

The true distinction is y^s. "an it was y intention of y parties to reserve a given rate of interest, and what y terms of agreamt in point of fact, is a question wh belongs to the Jury. But y facts being all given, or ascertained, y question in y transaction is a loan, or a purchase and sale, or an those facts amount to usury or not, are most certainly Ques- of sheer law for y Ct to determine.

It may be asked, how are these questions of Law and fact to be seperated! I answer, that if there be no special verdict found (wh is not usual) the Ct will inform y Jury so far as regards matters of Law, so that they may apply ym to y facts found, and thus render a verdict in pursuance of ym. 3 TR 538. 9. 1. Esp R 178. 1. Pet & 157. 2 Day 491. 2 Conn R 132. 291. 192. 192.

How far Usury affects y validity of Contratts.

The effect of reserving usurious interest, & of agreeing for it, is y^t of making y contract or security void, it makes not only the original usurious contract void, but also all subsequent securities, notes, Mortgages, Coverts, &c founded upon y^t contract voids. 1. Leon 307. Doug 736. Ord 91.

There is a difference between reserving and receiving usury interest. the one makes

And if y security of y Contract is taken in y name of a 3^d person - reserving and it is void if for y benefit of y Lender, Secis y Stat of Usury receiving usury and be a dead Letter, for every usurer ed evade ym. Skinner 348. Ord 97. 8.

But a security given by y borrower to a 3^d person, who y contract not privy to y corrupt agreamt and for a just debt due to but does not him by y Lender, is good. For y Stat with all its solicitude incur y penalty to protect y borrower from y payment of usurious interest, the other don't

117.
make y contract will not oblige a bona fide creditor, not consant to y
void, but ~~not~~ corrupt agreamt, to suffer rather yn y Borrower shd pay
neuss y penalty extraordinary interest. Thus A lends B. y sum of 1000 £
§§- at unlawful interest, and A being justly indebted to C, for
y same amount, it is agreed between ym yt B shall give
his bond to C for y paymt of yt sum. C not being privy to
y illegal transaction, may recover his debt on y bond vs
B. Cro E. 32. Zelveston 47. Talk 344. Com R 4.

Ord 98, 108.

And it makes no difference, an y borrower gives y bond
or security to Calone, or gives one jointly with A. Talk
344- Ord 108.

But on y other hand, if A owes B a just and
legal debt, and B is indebted to C. for y same amount, on
an usurious contract, and by agreamt A gives his bond to
C for y paymt of yt sum, C can't enforce yt bond, for tho
A was justly indebted to B for yt amount, still y consideration
of A's bond to C is no other yn y usurious agreamt between
B and C. Ibid 1. East 195.

If an usurious security is given with surety
and a counterbond is given by y borrower to y surety, yt
counter security is not usurious. Therefore if A borrows of B
£ 1000. at y rate of 10, per Ct, and as a further security to
B. A procures S P to join with him in a bond for y amt
to B and gives to S P a countersecurity. Now if S P is forced
to pay y bond to B. he may recover y same back from A,
on his counterbond. Cro E. 642. Moy 73. 2 Leon 166. Ord
100. 1. Cro Eliz 588.

It has been held however, yt if y surety knew y fact
of usury in y original bond and neglected to plead it in
bar of y original security, yt he will not be permitted
to recover upon his countersecurity vs y borrower. 3 Leon
63 Ord 100. 1.

This rule I have always regarded as very
questionable, for if y Surety did know yt y original bond
was given for an usurious consideration, what obligation ed

The Surety
can recede
recede. §§

he possibly be under, to be at all y expense and trouble of defending y Suit for y purpose of securing y borrower from paying illegal interest. For I trust, yt upon no principle cd he compel y borrower to reimburse his expenses, in case y defence was not successful, nor is there any mode by wh he cd compel y borrower to come and defend y Suit.

A Contract or agreement originally lawful can never be made usurious by a subsequent usurious consideration agreement. This is true notwithstanding to any illegal contract. Thus if a bond is given for a debt and lawful interest, a subsequent agreement to have illegal interest will not vitiate y contract, for y character of y Contract is determined at y time of making it, and a contract originally unlawful can't be made valid by any thing "ex post facto". 1. Saund 294 Cro E 20. Ray 197. Ord 101. 3 Feb 142. Joy 2. Senks 248.

So on y other hand if y debt or original contract is valid a subsequent security tho' usurious, don't invalidate y contract, y original debt remains good, for y security being a legal nullity does not destroy or merge y bona fide debt.

Or suppose yt a owes to B 2 debts or distinct bonds, y one lawful, y other usurious and afterwards gives a bond consolidating both debts into one. Now y bond is illegal by y usurious contract, still however y bona fide debt is not void, for y bond being a nullity it cd not merge y bona fide debt. For analogous cases vide Cro E 20. 2 Burr 1078. Ord 103. Contra. 1. Root 296.

But if a usurious contract or security is made y consideration of another, y new contract as well as y old is void. 3 RR 331. 8. do 390. 1. Saund 295. note 3. ^{Esperance} 22. 4. do 4.

But if an usurious security is transferred to a bona fide receiver without notice of usury, and he takes a new security from y same obligor, y latter security is good, tho' y former is void even as regards y bona fide receiver. 8 Feb 390. 3 Feb 22. Ord 103. note ^{Exp-}

If a security originally legal is transferred upon a usurious consideration, but afterwards comes into y hands of a bona fide receiver, it is good in his hands notwithstanding the intermediate usurious transaction. Thus A executes a lawful note to B anxious to raise y money procures it to be discounted by C at unlawful interest. Now C ed not recover y note vs any one, he being y usurer. Yet if he afterwards transfers it to D for a valuable consideration. Now D y bona fide holder may recover from A y sum or C y interest, tho' he can't recover vs B he being protected by y Stat. and to allow a recovery vs him, wd defeat y very object of y Statute.

2d 115- 1 Besh R 274. 1. Coit 92 2 Str 1155 Chitty on Bills 53. 4, 1300 East

That C can't recover vs any one. vide 1. Camp 141. 8.

Johns 88. 2 Con R 175. Peakes R 222. 1 Esp R 176. 5 Str

4. Mass 162- 109 1. Phil Ev 55. Now C y usurer ed not recover. quod he is y party to whom, y object of y Stat to refuse all remedies.

If an usurious security be taken up by y parties, and a new one substituted for no more y original debt. and y lawful interest, y new security is good ~~even~~ between y original parties. For y new security is given for what y law allows and y parties, (as it is said) recede from y illegal transaction, and substitute a legal one in its stead, and y Ct will encourage it, ord 103. B et R 1. Camp 1075. n Helo. 117. a 10 Mass 121. Contra Camb 154 3 Bay 356.

1 Camp 167. 5-2

Now if y original contract in y case supposed, was usurious, and not y security merely. y rule wd be a perfect anomaly in y law of usury, indeed it is clearly opposed to yt principle in y Law of usury, y a contract of a contract originally illegal, can't be made valid in any case.

Now if y original loan was indeed valid, and only y subseqt security usurious, why then y new contract might attach to y original bona fide debt, but if y rule be construed to extend to y those cases, when y original contract is usurious - then it is an anomaly in y law of usury -

It is y reservation of more yn y established rate of interest
wh makes y contract void, hence a contract reserving only
y legal interest, is not invalid by y creditors afterwards recovering. recovering
a higher premium - for y usurious reservation only vitiates
y contract.

It is true as I have before observed, yt y taking
of more yn y legal rate of interest, furnishes a presumption, yt
y original agreamt was illegal. 4 Bin 225- 2 Mod 307
Ord 103- D. to 105- Contra 3 Atk 14- ^{Burr}

Suppose yt a borrows of B \$ 100. and gives a note
for 100- with lawfull interest and when y day of paymt
arrives. B consents to forbear y paymt in consideration of
extraordinary interest - in ys y Creditor incurs y penalty
for usury - by recovering more yn y lawful rate of interest,
yet y contract itself is valid, quia there is no illegal reservation.
The taking being a matter "Ex post facto"

Tamen y word "taking" in y Stat, y true distinction is ys - This distinction
yt y reservation of more yn lawful interest in y contract is derived fro
makes it void - but does not incur y penalty of usury. y construction
On y other hand y act of taking more yn lawful interest and not y
incurs y penalty but don't affect y validity of y Contract - words of y St.
This distinction is taken by all Cts tamen y precise
phraseology of y Stat - Doug 223. 2 TB 241- 3. Do 539-
4. Do 184- Cowp 114-15- Ray- 196- 1. Taun 295- a. 7. TB 184-

On y other hand a contract or security originally usurious
cant be made good by any thing "Ex post facto" for every
contract is good or bad "ab initio" As A gives B a bond
reserving more yn lawful interest, but post B agrees
he will accept of y principal and interest - Now ys mont
render y contract lawful - upon y general principle. it
was void "ab initio" Hobbs 168- Ord 105-
Hot

An usurious contract is void not only as to
y borrower, & his representatives - but all persons whose

title to y property may be affected by y Contract, not only are executory Contracts - but also a mortgage or sale are voidable for usury.

+ To if y heir at Law of y ancestor or y executor of y deceased are sued in yr representative capacities. They may plead Usury Robert 229- 167- Noy 129- 1. alk 125- 2. Bes. 489- Ord 106.

So undoubtedly a contract originally usurious as vs a person claiming y property in question under y Borrower- Thus A makes a Usurious Mortgage to B and post sells y land to C - now C can recover ys and out of y hands of B - y first Mortgagee- This state has decided ys point - 1. or 2 Days B- See Ord 110- 1. Leo 304- But a mere tort feaser can't take advantage of usury in a Mortgage or other Conveyance-

if So of is assigned.

1. alk 125.

Ord 105.

This case supposes a Mortgagee under a usurious Mortgage in possession of y Lands of ~~the~~ nk he is dispossessed by a Trespass- 1 Leon. 307- or - and in nk case he can recover vs him

Ord 110

For more possession under colour of Title, and ys y Mortgagee So of a security certainly has) is satis as vs a trespasser- Ibid And a Contract given for money or security originally usurious is void in y hands of an Indorsee won at a play or Assignee witht notice of y usury, as vs y borrower, tho' t indorsed y good vs y Indorser & Cender Doug 736. 1. East 92- Chit on Bills 53. These authorities are to y point yf he can't recover vs y drawer, but yf he may recover y Indorser, who is y Usurer. Str 1155- Doug 713- 16- Com R 6- Chit 28- Com Dig 1 Mod 279. Title Usury- 6- et LaM 344- Ord 109.

So a

The Indorsee may recover vs y Indorser, quia he is y Usurer who is not protected by Stat, one object of the St being to punish him - and further y indorsmt makes y bill virtually a new contract - so yf as between y Indorsee and Indorsee it is a good Contract-

It may be drawn as a cotollary or conclusion from these

these last cases, yt y true distinction is - First, when a negotiable contract actually negotiated is usurious in in any of its Stages, yt a bona fide holder may recover y amount vs any of y ^{not} prior parties of y bill, for whose protection y Stat was made

2^d But vs y party who is to suffer by y usurious Bill and for whose protection y Stat was made, no recovery can be had by any one.

3^d Third, The party reserving y usurious interest cant recover vs any one whose name is upon y Bill, for he has done a crime and the Stat so far from protecting him, intended to punish him. The Lender or Creditor upon Usury cant recover his debt, nor can he justify y retention of any pledge wh may have been delivered to him, as collateral security for y usurious Loan, For y contract of pledging is infected with y usurious contract and y borrower or pawnee may bring an action of Trover and recover y Pledge - Ship Lench 62. 1 Leon 367. Ord q1 110-110.

40.

But where personal chattels are pledged, y borrower cant maintain trover, to recover ym, unless he has pd or tendered to y Creditor y principal and legal interests. 1. Tr 154. Ord 111.
"Trover 61." "C. Barlmont 30"

Now when a Mortgage is given for usurious consideration y Mortgagee may bring an action of Ejectmt, and oust y Mortgagee wth paying any part of y debt or interest.

These 2 rules at first view appear perfectly irreconcilable. Yet y principle on wh they differ, is y^s, Trover is an equitable action and wholly unknown at y C Law, and not *delinere* quia it is an equitable action, the Ct will not allow y lie? S. C. pawnee to recover y pledge, till he has pd to y Pawnee all he has received of him - For in all equitable actions at C Law, y same maxim governs, as in Cts of Equity. I. e. yt prays Equity, must first do equity, and y same principle governs in y^s case as in any action of *Ass. brot* to

It is 315-

to recover back if excess already pd on an usurious Contract.
Taltot 38. 111. 1. Howery 149. 2 Bern. 107

The mode of taking advantage of usury

In a 1st usury may be given in Evidence under y Gen Issue
so it may witht doubt in an action on Simple Contract.

In both cases however it may be specially pleaded. 2 Burr 1010,
1. Chit on pleadings 170. 2- Ord 91. 1 Pleadings 29

The It must be
specially pleaded.

But if y defence is usury vs a bond, co^{rt} or other deed,
it can't be given in Evi under y Gen Issue, but must be pleaded
specially and y^s for y very simple reason, y^t y defence is
inconsistent with y plea. The Plea "non est factum" denies y^t
y Def executed y bond or deed; whereas y defence of usury ad-
mits it. Hobart 72. 5 Co 119. 2 Blk R 1108. Gibb Eri 183. 3 Lark
391. Esping 223. 4- Ord 91. 2-

Contract is
technical, tis
not enough to
say this usurious
& must allege
the amt of Loan
3e-

When usury is specially pleaded, y corrupt
agreement must be specifically stated in y Plea. Gen Pleadings
will not avail 1E. it is not satis for him, to state y^t y
contract was usurious and void, but he must sit forth
amount of y Loan, or debt, y date, y Premium reserved
E3e. 2 Keb 575. 525. 2 Shower 329. 2 Mod 385. Ord 92-

For can he
have "audita
querela". Co
E. 25. Ord 93.
sure some.

But if a judgmt has been recovered upon^{an} usurious Contract,
it can't post as a gen rule be impeached for usury. for y
contract is at an end, being merged in a judgmt debt, and
if y Plt^t shd post bring debt or "Dei^e Facias" on y^t judgmt
y Def can't plead usury, for he has once had an opportunity
to avail himself of y^t plain fact and y^s is done y^t there
may be some end to litigation. Cro E 25. Ord 92. 3. Cro E.
588. Strong 1143. 2. 2 ves 147. 1. atk 345

apost facto,
matter has
risen, of wh y
Plt^t ed not before
avail himself

But debts of record as they are called may be impeached
for usury- for a judgmt is excepted not quia tis a debt
of record, sed quia tis a judgmt.
Thus a St Merchant. Staple- or recognizance when given
for usurious consideration, may be avoided for y^t cause-

⁵
 1. *Pr.* for they are in y nature of assurances and are contemplated as such by y Stat and *Id* there is no sentence of y Law impeached by impeaching ym. in yss cases. *2 3 Co. 80. a*
Ord 93.

But tho in general a judgmt can't be impeached for usury, yet a judgmt entered by warrant of atty or confession in pursuance of an original engagemt made by y parties, yt such a judgmt shd be entered, y^s agreamt being part of y original usurious contract may be impeached, for in such cases y judgmt is an expedient devised at y time of making y corrupt agreamt, and for y sole purpose of avoiding or evading y St. Nor is y^s judgmt like others, *reditum inivertum* *Pr 1042- Ord 94*
⁵

But as to y mode by wh these judgmts are to be impeached there is some difference of opinion. It has been decided in y Common Pleas yt they may be set aside in a summary way by motion - *Ord 95 Barnes 57- 234-*

In y other hand y Ct of Kings bench has holden yt relief cant be obtained in y^s way and yt not thty most clearly can't judgmt can be relieved so in a Ct of Ch. Indeed yt Ct has holden that be impeache relief can only be obtained by Bill in Equity. *Peak in 34. 36. collaterally.*
Ord 70. 36. 1. Anstruth 7. 1. To 267. 1 Day. 117. But a 'mole
Bull N P. 232. is not colla

Now if y^s be true then, there is no way of avoiding y principal but ymas and lawful interest, for a Ct of Equity will only relieve y excess for y very Hence it always it appeared to me yt y Rule of y Comon Pleas purpose is y correct one, for it is y only rule yt gives y party injured of settling y a complete and effectual remedy. *judgmt aside -*

In Conn. By Stat provisions, y Def who is sued on a contract may by way of defence to y action at Law file his complaint But Def in y nature of a Bill in Equity, stating y usurious agreamt, must say by wh complaint he appeals to y conscience of y Stt and compels y principal him to answer interrogatories, and if judgmt be rendered on his confession, it is given for y principal witht any interest.
 1. Root 129. 255. 367 115. 256.

The replication to a plea of usury was olim required to be special and by y old precedents, it must traverse all y material allegations in y plea specially.

2 TR 439.

4 DO 429

1.

But lately for convenience. Gen Pleading is allowed. It is ergo satis qd reply yt it was not corruptly and wth y St. agreed, y^t y Debtor shd pay 23c. or in more general words, still, as y^t y said note or writing obligatory, was not made upon and p^r in pursuance of said agreamt for more yn lawful interest, or for y purpose of evading y St. as is alleged—

1. Chit Plead. 616—2 TR 439 3 To 28. 1. Faur 102, 2 note, 1. B et P 144—
426.

And where y traverse contained in y replication is thus Gen Gen, it ought of course to conclude to y Country— and with a verification— Ibid

Penalties.

Ord apx

8- 116. 17.

The taking or receiving of more than legal interest under y St subjects y receiver to a forfeiture of treble y value of y sum lent, The moiety of wh penalty goes to y king and y other to y Prosecutor. So y^t by y Eng St a person convicted of taking usurious interest on 1000 Doll. forfeits 3000 Doll

By our St y usurer incurs a forfeiture of only y single amt of y loan, of wh one moiety goes to y State and y other to the Prosecutor. Ord 116, y. 123, apx 8. Com St usury

In y.

principal alone

is forfeited. Soon post y St of Am, y borrower was considered "particeps criminis" and as such answerable to punishment. This opinion is overruled however. y borrower it is true a party to a transaction wh y St condemns as unlawful; but so far from being considered as "particeps criminis" tis y very object of y Stat to protect him. 1. Salk 22. Ord 116. 121.2

To incur y penalty for usury y lender must actually take unlawful interest, for y reservation or agreamt to receive a higher rate, don't incur y bat penalty, hence it is holden—^{if} any agreamt to have unlawful, ^{the}

borrower tenders it and y lender even tells it, but refuses to take it, yt he don't incur y penalty. Doug 235. 1. Tanna 294. n. 1. 3 Leav. 205 4 do 42 3 Leav 205. 420. 43

And in order to complete y offence, y usurious interest must have been received by y lender in money, or money's worth. I.E. valuable property.

If therefore an usurious note or security is taken up and another substituted in its stead, ys don't subject him to y penalty, quia being substituted for y first note, it was void, and of course no payment of itself and at most it only gives a right of action & may never be pd. 7 Ark 180.

Ord 1172.

But y whole penalty may be incurred by y lender's receiving any part of y interest over y legal rate, as where a bond usurious reserves 10 per Ct interest and y lender actually takes 4. per Ct y offence is complete. 1. East 195. Doug 223. Ord Cro Ch 20 where it is laid down, yt if y lender on an usurious contract, receives any part of y interest however small, y offence is complete; even shd it not amount to one half of y legal interest. This Rule is not Law. Mr F Butler explains it to mean, yt if y lender takes any thing above legal interest, y offence is complete. With ys explanation, tis correct. Doug 236.

It is clear then yt y offence is not complete, till more yn legal interest has been received in y whole, but a fractional part of yt interest may be received at 1. time & part at another. Doug 232 or 223.1. East 195. Ord 53.4. 118-

Hence if a loan is made for 100. doll at y legal rate of interest for one year, and payable quarterly, but an additional premium of 6. per Ct is taken at y time of executing y loan. Now y offence is not complete, till some part of y accruing interest has been received, for it being a negotiable interest, he has a right to deduct y interest for a year from y amt of y loan, but on

payment of any part of y accruing interest, y offence is complete and y lender is liable to be prosecuted for y penalty immediately. 2 Bl Re 792. Ord 54. 102. 13.

The following question has been much discussed and is all important, so far as regards prosecutions for y penalty.

Suppose y t under y St of Am, a contract is made for y loan of £ 100. at lawful interest and 5 per ct is also deducted from y amount at y time of making y loan, so y t in reality y borrower receives only £ 95. Now y s contract to be regarded as a loan of £ 100. or of £ 95. only.

Now if y s is to be regarded as a loan of 95. why then is it clear, y t no interest at all has been pd. only loan, ^{at y time} for y 95. £ retained can't be held as interest, and amt a deduction: if therefore more y n legal interest on 95. is pd, tis usurious. 2 Bl et £ 381.

But if it is a loan of 100. pounds, then y reservation of 5. pds. is legal interest, so it is held in y books.

2 Bl Re 793. 3 Mils 250-62. Doug. 223-1. East 135. proving y t y loan is a loan of 100. pds.

Deducting ergo of 5. pds is not usurious. But if a sum deducted exceeds y t sum, tis usurious, and subjects y receiver to y penalty.

The whole thing amts to y s. y t y loan, is a loan of 100. instead of 95 pds.

By y eng Stats y action for y penalty must be bro't within 1. year after y offence is completed, i.e. after usurious interest has been actually received.

The same Rule prevails in y s State under a provision for limiting y time within wh prosecutions shall be bro't

on all penal Sts, Ord 124.5. Suppose a loan is made for 3 yrs reserving usurious interest to be pd annually. In such a case tis a rule, yt every paymt & receipt of more yn legal interest is a repetition of y offence. By yd I dont mean, yt y penalty may be enforced 3 distinct times. But if after y lender shall have taken usurious interest y first year, he shd not be prosecuted for it, till one year had expired; y prosecution for yt specific offence wd then be barred by y Stat of limitation. But if he shd then take y usurious interest y 2^d yr, he may then be prosecuted for yt offence 2 B et P. 381.

This penalty is recoverable by action of debt, bill, plaint, or information. 11. Mod 174. i Bern 109. 209.

Ord advances a doctrine (123) viz yt as y St prescribes y mode of recovering y penalty, yt an indictment cant be prosecuted and relies for his authority on. 11. Mod 174. Now I conceive ys doctrine is incorrect, for ys offence was indictable at C La- and when an offence is indictable at C Law, and only sanctioned by St. y St. as I conceive, dont take away y common law rights. That it was indictable at C Law. 1 Sid 424-21- 3 Falk 391 as to y mode of alledging y offence, it is a general rule yt y terms of y Stat must be pursued, and ys is a rule common to all penal Sts.

Silverson
Sts 16
"Municipal"
Law 44

For if y Terms of y Stat must are not pursued, no offence is disclosed. It must state y contract precisely, as it was, and must follow y terms of y Stat substantially, if not literally. It is not satis then to state, yt y Def did make a corrupt agreamt - Contra Former Sts 11. Co. 578 1. Lear. 96. 208. Cro S. 104. 1. Kel 629. and Strong 816.

Both y parties to y usurious agreamt must also be named for y sake of certainty Ord 127. Boy 143. 2. Leon 39. I wont do to say, yt John Stokum cheated Billy Garin- or some one else. It seems to be agreed yt in prosecutions for y penalty

y sum. Precision is not required as in a plea in bar, to an action brot on y Contract to recover y Loan said to be usurious, and y reason is yt a prosecutor is not always a party to y corrupt agreamt, yet ys is at best a very vague and indistinct rule, and y safer method is to state y contract precisely. See y Rule Cro El. 440. 2 Hawk Pl of C.C. 82. 24. Chap 22-

In prosecuting for y penalty, tis satis to allege, yt y Def^d received more yn legal interest, wih^t stating how much-

Ord^r And has ~~been~~ laid down ^{one} rule, wh^{ch} can't be, as it is opposed to every analogy, Nor is he supported in y authority wh^{ch} he quotes. viz, y time of y receipt must be precisely laid, so yt it may appear yt y prosecution was commenced within due time after y offence done. In no civil action scarcely be alleged. Now. it is satis. so far as regards y time, to alledge yt it was committed within 1. year next preceeding y time y action was brot. Ord 127. He there cites Coup 761. Now y doctrine there laid down by Ld Mansfield yt y time must be correctly stated. - ys indeed is necessary in order to describe y contract. 4 Esp 154. 5. do 33. must be stated,

quia tis a an In a prosecution for taking more yn lawful interest essential ingredient on a loan alleged to be in money. tis satis to prove yt of y agreamt. part of y sum was in money, and part in goods received and in some as for money - and if so it wd follow most certainly cases, The termini yt if y whole sum was in goods received as for money, must be stated - it is the same thing - for in reality there was no variance they were received as money, and for y purpose of converting them into money - 1. Pl 283.

What is Legal Interest.

Where interest is expressly agreed upon it must be paid according to the agreement. But where there is no agreement, there has been much dispute when it is legal.

1. Where there is no express agreement, interest is demandable on all liquidated debts from the time of the date. 7 P.R. 124
- 2 B.R. 761 2 T.R. 58- 1. H.B. 305. 4. 3 Nils 215. 265- as a bond, or note-

But for good sold or labour done, interest is not demandable. 1. H.B. 315- Chitt on Billy 213.

But if there is a specific price fixed, and the day of payment, I see no reason, why interest may not accrue from the day - and so it has been decided, even where the precise sum was not liquidated - 2 B. & C. 337. Doug 376. 2 B. & P. 206. n 2 New Rep 206. n 4 Tall 289.

A debt liquidated by judgment, will draw interest.

- 1 B. & P. 29. 2 N. R. 206. n. Doug 752
4 Tall 251. 2 Burr 1037. 4 Do 2128.

But the rule supposes, an action of debt on judgment brought, but the rule doesn't hold as to bail in error.

For trial not your fault, the judgment was superseded
2 T.R. 58. 59. 78. 9. Doug 723. note 3.

An obligation for a sum certain, payable on demand, doesn't draw interest till demand - Cowp 796. 1 B.R. 761.

- 2 T.R. 58. Chitt on Billy 213. Mat's partnerships 200.

The Courts of your state have made a different rule, as where an obligation for a sum certain, payable on demand, draws interest from the date -

But if a penal bond condition for the payment of a certain sum, and no time of payment is fixed, the payment must or draw interest be made from the time of date.

and yet it is held in Eng. yt no interest accrues. 1. B et P. 337. and Why! quia a single bill never appoints a day of paymt, nor on request. — Suppose an actual demand and it not draw interest from yt time. — I trust it wd.

Again it is held, in apt for money had and recd, interest is not allowable —

2 Burr 1085. 1 B et P. 306. 2 Do

472 — 3 Kaines 266.

And why not! we have no reason upon any of these rules. the principle is the Def is Trustee of Plt's money. and y fact mere fact of one man having y money of another don't subject him to paymt. But if on demand, he won't pay. then it will draw interest —

Suppose a wrongfully sells B's goods, and keeps y money — won't a recover interest — Certe —

It has been determined, yt if y Def has used y money for his advantage — he must pay interest —

12 Camp 50. 52. 2 New R 286. note

The Rules seems to be, where one holds another's money, and is ready to pay it, no interest accrues —

When interest is allowed in these cases, it's computed up to y day of y Judgmt. — Because interest is an inseparable incident to y debt. 2 Burr 1085. Doug 361. 2 T R 158. Chitty on Bills 214. Toller. 286.

Interest is allowed on account stated; and why more yn in y case of money. had and recd. 2 3 Wils 205. 2 Ves 365. 2 B et P 337. 5 Esp 114.

further where from y course of dealings, it can be inferred yt they intended y debt shd draw interest, it will draw interest — so of y usage of a particular house, if known to y Creditor, = as post 60. days —

If A in y country buys of B and knows yt usage — a impliedly assents to it — Toller 287. Haver 207.

432
A legacy in certain cases, will draw interest, if charged
on any fund⁺ yields interest, or if y legacy is specific -
and itself yields interest -

2 B et 206, n
2 P Mil 26. 3. Do 253. 1. Bes. 308. 2 Do 563. Falk 415.
3 atk 716. If administrator or Executor detains unreasonably, he is liable
2 Besy 85. 1. P. n Q 359. 375. 2 Bern 548

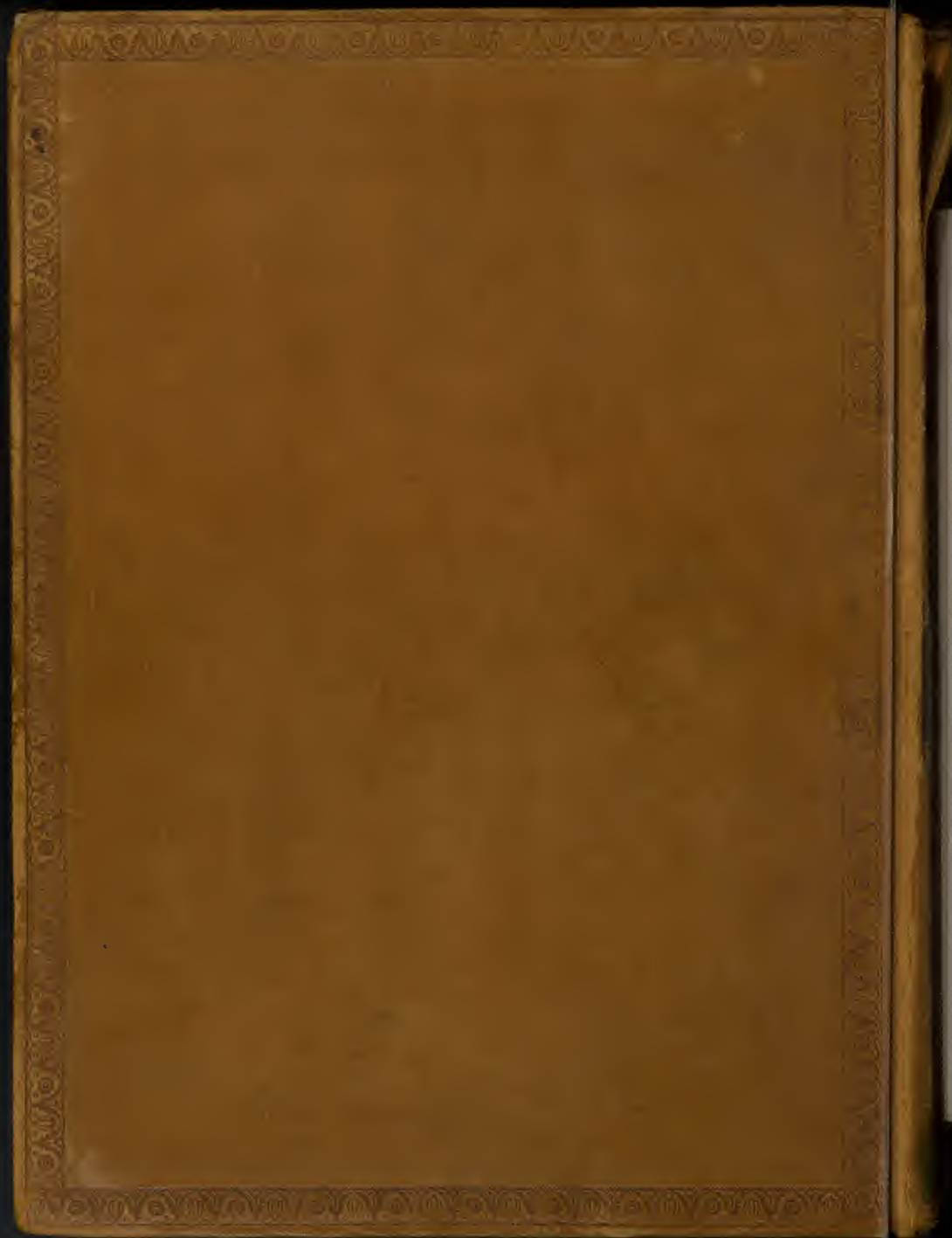
So a depositary must pay / interest, if he detains it.
The rule supposes - he wrongfully holds after demand -
Lug 327.

After a party has had payment and accepted y whole
principal, he can't bring a separate action for y interest
5 Y R 229. 1. Ep R 110. 2 New R 206 note

The reason is, y interest is an inseparable incident and
interest and principal must coexist. But I don't think
Equitable -

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